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CONVEYANCER'S NOTEBOOK.

Repair of War Damage.—There have been two statutory provisions on this subject: Repair of War Damage Act, 1941, which is essentially an amending Act, and the Diocesan Reorganisation Committees Measure, 1941, which is concerned with war damage to churches and parsonage houses.

The Act amends the Housing (Emergency Powers) Act, 1941, ss. 1, 2, 3 and 4, and the Essential Buildings and Plant (Repair of War Damage) Act, 1939, ss. 3, 4 and 5. It also provides that the definition of "war damage" in the War Damage Act, 1941, s. 80, shall be substituted for the definitions in the Acts amended: Repair of War Damage Act, s. 3. The Housing Act is extended to the Isles of Scilly.

The amending Act contains several provisions extending the powers of a local authority in matters of finance, but for the ordinary practitioner the main importance in the changes is concerned with notices to carry out works in damaged buildings. The local authority, before serving such a notice, need not wait to satisfy itself that the person having control of a building is unable or unwilling to carry out works necessary to render a damaged building fit for housing purposes. The authority may serve the notice but, if after considering any representations made by the person on whom it is served, the authority is satisfied that he is able and willing to carry out the works the notice shall be withdrawn. Where the local authority has to carry out the work such force as may be reasonably necessary for forcing an entry may

be used where it is expedient in order to avoid undue delay: see section 1.

Furthermore, where any building, whether a house or not, is in any respect unfit for housing purposes by reason of war damage, any urgent repairs expedient for avoiding danger to health or preventing the deterioration of the building may be executed by the local authority. Any person authorised by the authority may enter on the premises and reasonable force may be used where it is expedient: see section 1.

If, after the expiration of the period fixed in the notice to carry out works, no objection has been received from the person in control of the building the local authority may execute the works. If objections are received the authority shall consider them and either withdraw the notice or, if not satisfied that the person is able and willing to carry out the works, the authority may execute the works specified in the notice, or such other works as will render the building fit as may be agreed between the authority and the person having the control of the building.

The purpose of the Measure is the opposite of the Repair of War Damage Act. Its purpose is to provide machinery for deferring the restoration of damaged churches and parsonage houses. Its other principal function is to provide a committee for each diocese to act on behalf of owners of all church lands with regard to (a) claims for compensation under the War Damage Act; (b) receive payments from the War Damage Compensation; and (c) dispose or allocate such payments, after consultation with the owners of the land concerned, subject to any conditions determined by the War Damage Commission. The Committee will also advise the bishop of the diocese on re-arrangements for pastoral supervision of any area.

The actual order for deferment of restoration of a church is made by the Ecclesiastical Commissioners upon a request from the bishop made in pursuance of a recommendation of the Committee. The order may be made for a period of five years and the church shall not during that period be restored without the consent of the bishop. Banns of marriage shall be published and marriages celebrated in such other church, chapel or place of worship as the bishop shall in writing direct.

In the case of parsonage houses the Queen Anne's Bounty takes the place of the Ecclesiastical Committee. An order for deferment releases the incumbent from liability to maintain the parsonage house.

In effect, then, the Measure now puts the general responsibility in respect of war-damaged churches and parsonage houses upon the

Diocesan Committee. In the event of war damage to either of these kinds of buildings communication should clearly be made as soon as practicable with the Diocesan Registrar who will, no doubt, be informed of the details of the Committee.

Extension of time of war damage risk.—War Damage (Extension of Risk Period) Act, 1941, extends the period of risk for Part I of the War Damage Act, 1941, to August 31, 1942. This extension is called the " second risk period " and the contributions towards the expense of making payments shall hereafter be determined by Parliament.

Custodian trustee.—Under a new paragraph to rule 30 of the Public Trustee (Custodian Trustee) Rules it has been provided that the Treasury Solicitor is entitled to act as a Custodian Trustee.

Stamping of assents by way of appropriation.—The Publishers have received a letter from a correspondent which states that an appropriation by way of assent to one of three residuary devisees, also executors, and without any power in the will, was adjudicated as bearing no stamp duty. The assent contained an acknowledgment and this likewise bore no duty : see 2 K. & E. (14th ed.), p. cxli. The assent was in the form provided by 1 K. & E., p. 250, and this communication may be noted by users of that volume in respect of notes on pp. 243, 248 and 251. In the light of the doubt that exists about the stamping of appropriations it is obviously desirable to have such an assent always adjudicated since this should avoid any possibility of stamp objections : see Stamp Act, 1891, s. 12.

Agriculture (Miscellaneous Provisions) Act.—This Act, as its name implies, is rather a mixed bag, but it contains two matters of considerable importance to the owners of agricultural land. The first provision is an extension of the Agriculture Act, 1940, concerning the drainage of land and also provides for the recovery of expenses in certain cases for work done in connection with such drainage. The Third Schedule deals with recovery of expenses

from the owner of the land benefited; paragraph 6 provides that the Minister shall have a charge and the same powers as if a charge had been created by deed under the Law of Property Act, 1925. Peculiarly enough the provisions do not state whether the charge is legal or equitable or whether or not it is registrable under the Land Charges Act. An owner is defined as the person in receipt of such rent. The Act makes a charge created in respect of expenses for improvement of a way over fenland registrable as a local land charge, but whether it is a legal or equitable charge (see section 8 (3) (d)) the Act does not say. This would obviously be material if the Minister were to exercise the power of sale conferred upon him. Presumably the Courts will interpret the section to confer a charge by way of legal mortgage. Owner of the land for the purposes of this section means the same as for Schedule III.

Secondly, the Act provides for compulsory acquisition of land of which possession is taken by War Agricultural Committees on the ground that it is not being cultivated or not cultivated properly. This compulsory acquisition is governed by the rules under this Act, mainly the Lands Clauses Act as amended for this purpose, including the subject of compensation. There is also a restriction on the disposal of such land by the Minister.

"THE CONVEYANCER IN THE COUNTY COURT"

being the text of a lecture
delivered by
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The practitioner who specialises in Conveyancing and who "can't be bothered" with litigation, is apt to look upon the county court as the anathema of the profession—the place to be avoided at all costs by any solicitor who desires to earn a "living wage". Some conveyancing practitioners go further. They believe that the county court not only *ought to* be avoided, but also that it *can* be avoided. If any of their conveyancing matters become involved with litigation, they think at the worst it will all take place in the soothing atmosphere of the Chancery Division and, for the

provincial brethren, will be conducted at a safe distance by London agents.

It is true, of course, that the county court is precluded from dealing with the subject-matter of the major portion of transactions passing through the hands of a conveyancer. Section 40 (1) of the County Courts Act, 1934, provides that "a county court shall not . . . have jurisdiction to hear and determine . . . any action in which the title to any hereditament . . . is in question". But the conveyancer is not permitted to raise a question of title in *any* action in which a client of his is concerned. The jurisdiction of the county court is ousted under this section only if the question is raised properly and in good faith. For example, whereas a dispute between a landlord and tenant as to whether the whole of a house or only part thereof was demised is a dispute of title and one over which the county court has no jurisdiction (*Chew* v. *Holroyd* (1852), 8 Ex. 249); if, on the other hand, it appears that the dispute is merely a matter of a tenant questioning the title of his landlord—a thing which the tenant cannot do, of course—there is no *bona fide* question of title in dispute and the county court Judge may proceed with the case (*Wickham* v. *Lee* (1848), 12 Q. B. 521; *Lilley* v. *Harvey* (1848), 5 Dow. & L. 648). Again, in cases of trespass to land it should be remembered that trespass is a wrong against possession and not against title, and if the plaintiff has an undisputed possessory title the action is not one in which the title to any hereditament is in question (*Hawkins* v. *Rutter*, [1892] 1 Q. B. 668).

Moreover, there is section 51: "A county court shall have jurisdiction to hear and determine any action in which the title to any hereditament comes into question, being an action which would otherwise be within the jurisdiction of the court—(a) in the case of an easement or licence, if neither the value nor the rent of the hereditament in respect of which the easement or licence is claimed, or on, through, over or under which the easement or licence is claimed, exceeds the sum of £100 by the year, or (b) in any other case, if neither the value of the hereditament in question nor the rent payable in respect thereof exceeds the sum of £100 by the year." Briefly, if neither the annual value nor the annual rental of the premises, the subject of the action, exceeds £100, it does not matter whether the title is in question or not—the county court has jurisdiction.

Therefore, even everyday conveyancing problems may become the subject of county court proceedings. The contents of a tenancy agreement or a lease, the wording of a conveyance or the provisions of a mortgage may be considered and determined by the county court

and the conveyancer cannot consider himself free from criticism by the learned county court Judge, who, although generally occupied with matters concerning the collection of debts, the results of minor accidents and arbitration upon workmen's compensation, yet maintains a wide jurisdiction over conveyancing matters. This fact is substantiated by other sections of the Act. Turn to section 52 (1): "A county court shall have all the jurisdiction of the High Court to hear and determine any of the following proceedings, that is to say, . . . (d) proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where in the case of a sale the purchase money, or, in the case of a lease, the value of the property, does not exceed the sum of £500." That is a provision which surely goes to the very heart of a conveyancing practice. In the case of a sale, it is to be noted that it is the purchase money and not the value of the property which determines the jurisdiction. So, if a million-pound property were subject to a mortgage for £999,500, and accordingly only £500 were passing as the purchase price, the county court would have jurisdiction to order specific performance of the contract for sale (*R.* v. *Whitehorne* (*Judge*), [1904] 1 K. B. 827). This is not so in actions relating to leases. It is then the value of the fee simple (not the value of the leasehold interest) which governs the jurisdiction.

Section 52 (1) from which an extract has been quoted is of the very greatest importance to the conveyancer. Consider the other sub-paragraphs of the section. They give to the county court jurisdiction in the administration of deceased person's estates not exceeding £500, the execution of trusts over property not exceeding £500 and declarations as to whether such a trust exists, foreclosure or redemption of mortgages or the enforcing of charges or liens where the amount owing does not exceed £500, the maintenance or advancement of infants whose property does not exceed £500, and the existence, dissolution and winding-up of a partnership the assets of which do not exceed £500. These are all matters of pure conveyancing and so that there should be no mistake as to the extent of the county court's jurisdiction and in order to dispel doubts which had previously been thrown upon it, sub-section (2) adds the provision that in all such proceedings "the judge shall, in addition to any other powers and authorities possessed by him, have all the powers and authorities . . . of a judge of the Chancery Division of the High Court".

This "Equity Section" of the Act is of practical importance to provincial practitioners. Any person who has endeavoured to conduct Chancery litigation through the District Registry will realise

the reason for this remark. By reason of the inferior position of a Chancery Master as compared with the Master in the King's Bench Division, the former, for some unintelligible reason, not being considered fit to take such decisive steps, as, for example, giving judgment by default, the District Registrar when acting in Chancery proceedings has to transfer the case to London for almost any order required. As so many Chancery proceedings are not what one would strictly term contentious, such transfers seem unnecessary, inconvenient and expensive. It very often happens that Chancery proceedings are instituted for no reason other than the relief of a person in a fiduciary capacity from certain responsibilities. It is desired to obtain that relief with as little consequent expense as possible, but the provincial practitioner is forced to incur the trouble and expense of instructing London agents and counsel in the details of a complicated estate or fund. Those instructions may be required only for the purpose of obtaining an order and then the whole proceedings are passed back to the provincial practitioner, for, say, accounts and inquiries. For this reason Chancery procedure is regarded with horror, is studiously avoided in District Registries and is blessed only when it does not matter how much of the estate or the fund is eaten up in costs—the solicitors concerned graciously accepting a division of the whole estate between them in settlement of their costs.

But in those very cases in which the provincial practitioner desires to save the expense of Chancery litigation, *viz.*, when there is only a small estate involved, the solution is at his own doorstep. Let him seek the assistance of his local county court where he can, without London agents or learned counsel, himself appear before the county court Judge whenever an order is required and explain the requirements of his particular case in that "tea-party atmosphere" which always seems to envelope Chancery litigation.

The cases specified in section 52 (1) do not exhaust the county court's jurisdiction over the conveyancer. Other statutes have given the county court Judge more and more work to do and the idea is fast fading that the average county court Judge knows nothing of the law of real and leasehold property. Section 52 (3) states that "without prejudice to the generality of the foregoing provisions of this section, a county court shall have jurisdiction . . . under the enactments set out in the 1st column of the Second Schedule to this Act in the cases respectively mentioned in the 2nd column of that Schedule" and a reference to that Schedule soon impresses one with the Legislature's opinion as to the knowledge of equity matters possessed by a Judge who was probably a common law counsel.

That schedule is astonishing. It can safely be said that any practitioner who has not studied it would not have imagined, in his wildest dreams, that the county court possessed so wide a jurisdiction. There are extensive powers under the Trustee Act, 1925, for appointing trustees, making vesting orders in all sorts of circumstances and giving relief to trustees; under the Law of Property Act, 1925, over trustees for sale, tenants in common, joint tenants, party structures, incumbrances, custody of documents, mortgages, equitable charges, assignments of things in action and other matters dealt with in that Act; under the Land Charges Act, 1925, to make orders vacating registrations under that Act; and under the Administration of Estates Act, 1925, over personal representatives: and now adjudication upon the rights of landlord and tenant under the Leasehold Property (Repairs) Act, 1938, has been added to the schedule. All this jurisdiction is, of course, governed by the criterion—the value of the property to be dealt with. But, although it is limited to cases in which the value of the property to be dealt with does not exceed £500 its possibilities, generally unrealised by the profession, are enormous. Add to this the powers of the county court which are not specifically mentioned in Schedule II of the Act, for example,

(a) under the Building Societies Act, 1874, to make orders on a society's officers, to enforce awards on disputes, to hear and determine disputes and to wind up a society;

(b) under the Chancel Repairs Act, 1932, to determine the liability for repairs to chancels;

(c) in the administration of charitable trusts with an income of not more than £50 a year;

(d) to hear appeals from Queen Anne's Bounty on all questions relating to dilapidations, fixtures and things belonging to an ecclesiastical benefice;

(e) to hear appeals from the Commissioners of Inland Revenue as regards succession duty not exceeding £50;

(f) under the Roads Improvement Act, 1925, with regard to disputes over grass verges and obstructing views to corners, no matter what amount is involved;

(g) under the Ribbon Development Act, 1935, for apportionment of expenses of entrances to land ordered by the local authority;

(h) under the Land Registration Act, 1925, to hear appeals from the registrar as regards production of documents, costs, inhibitions, restrictions, rectification, indemnity and other like decisions;

(i) under the Public Health Act, 1936, in relation to the recovery of expenses on private street work;

(j) under the Small Dwellings Acquisition Act, 1899 (as amended by the Housing Act, 1932), to grant to a local authority which has advanced moneys for house-purchase, an order for recovery of the dwelling, whatever the amount of the advance or the amount outstanding;

(k) under the Allotments Act, 1922, with regard to the setting aside of fields for allotments;

(l) under the Tithe Acts, 1891 and 1936, for recovery of tithe rentcharge and over other matters relating to tithe;

(m) under the Law of Property Act, 1925, for the apportionment and redemption of rents;

(n) under a miscellany of Acts, such as the Shops Act, 1934, the London Buildings Act, 1930, the Local Government Act, 1933, the Inclosures Act, 1868, Coal Mines Act, 1911, and many others, all affecting matters with which the conveyancer comes into contact in practice.

Having regard to these statutes it is hard to realise that the statute which created the modern county court, namely, the County Courts Act, 1846, was entitled "An Act for the more easy Recovery of Small Debts and Demands in England". Lord Brougham's intention, when forming the scheme upon which the statute was based, was that the old county courts, having their origin in Saxon times, but having fallen into disuse and having been superseded by a variety of "courts of requests", should be revived in a form appropriate to the times and should offer an inexpensive and common procedure for the recovery of small debts. But his scheme proved to be so sound that the originating statute has been followed by twenty amending statutes enlarging the jurisdiction of the county court and the innumerable statutes, mentioned already, placing further labours upon the shoulders of the over-burdened county court Judge. No longer is the county court merely a minor common Law Court. It is all the divisions of the High Court rolled into one with the addition of a mass of statutory proceedings for which accommodation could not be found in the higher and more august tribunals.

As has been indicated, the statutory powers of the county court are of particular interest to the conveyancer and become of greater interest each year as "thick and fast they come at last and more and more and more". For, as if those statutes which have already been mentioned were not sufficient, there must be added the four that may be termed the "County Court Conveyancing Statutes"

which are of greater practical importance than any of the other "special jurisdiction" statutes. Those four are: the Landlord and Tenant Act, 1927, the Agricultural Holdings Act, 1923, the Housing Act, 1936, and the Rent Restriction Acts, 1920–1939—the charters of the owners of business premises, agricultural holdings, working class dwellings and small houses respectively. Because of their continual use each of these deserve more detailed consideration than it has been possible to give here to the other statutes.

The Landlord and Tenant Act, 1927, gave to a tenant of business premises the right to claim compensation in respect of two things, *viz.*, (1) improvements, and (2) goodwill. As regards the former, the tenant who has made improvements which increase the letting value of his holding and who makes a claim to compensation within one month of notice determining the tenancy or between one and three years of its determination otherwise, is entitled to claim from his landlord a payment not exceeding the net addition to the value of the holding as a result of the improvement or the reasonable cost of carrying out the improvement. He may have the amount of this payment determined by "the tribunal", subject to the limitations which the Act places upon such a claim and to the objections allowed by the Act to be put forward by the landlord—all of which matters may be determined in the absence of agreement, by "the tribunal". As regards goodwill, the tenant is entitled to claim compensation if he satisfies "the tribunal" that "by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto". Again there are limitations to the claim and objections which can be made by the landlord, all of which may be adjudicated upon by "the tribunal". Further, the tenant may, under certain circumstances, be entitled to a new lease when a money payment cannot compensate him, and in such cases "the tribunal" may fix such important matters as the length of the term and the amount of the rent. The rights of any mesne landlord may be decided by "the tribunal". Who, then, is this important body which is designated "the tribunal"?

Turn to section 21 (1): "The tribunal for the purposes of Part I of this Act" (the Part which deals with the matters mentioned above) "shall be the county court within the district of which the premises or any part thereof are situated." A proviso is added for transfer under certain circumstances to the High Court, but it is the county court which the Legislature has specifically

allocated as the judiciary for all the difficult problems arising under the Act, with no limit of jurisdiction to the amount claimed or the value of the property concerned. Evidently, the Legislature has long forgotten the title of the Act of 1846, for under the Landlord and Tenant Act, 1927, the county court adjudicates on something which is far removed from a "Small Debt or Demand".

The Landlord and Tenant Act, 1927, affords a good opportunity to stress the point which has been made already—that the conveyancer cannot shut his eyes to the jurisdiction of the county court. Section 9 (which is in Part I of the Act) reads as follows: "This Part of this Act shall apply notwithstanding any contract to the contrary, being a contract made at any time after the 8th day of February, 1927". From this it would seem that there is no contracting out of the Act, but the section continues: "Provided that, if on the hearing of a claim or application under this Part of this Act it appears to the tribunal that a contract made after such date as aforesaid, so far as it deprives any person of any right under this Part of this Act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto." Accordingly, it has become the custom of cautious conveyancers when acting for a landlord to endeavour to obtain the insertion in the lease of a covenant whereby the tenant agrees not to make any claim for compensation for improvements or goodwill; the covenant should also state that there is adequate consideration for the giving of it. Again, those conveyancers who do not wish to be involved in county court litigation and who, if provincial, would rather have their litigation conducted by their London agents or, if London solicitors, would rather conduct it in the Strand than elsewhere, will insert a provision that for the purposes of the lease the tribunal for matters arising by virtue of the Landlord and Tenant Act, 1927, shall be the High Court and not the county court.

And so the county court makes its presence felt even in the offices and chambers of the draftsman who abhors "local litigation".

It need only be added that, if he does become involved in such litigation, the Rules (County Court Rules, 1936, Order XL) direct his footsteps and the Forms annexed to the Order (Forms 330 to 342) are a model of clearness. A mere reading of Form 330, "Originating Application for Determining the right to Compensation or Relief in lieu of Compensation", tells him exactly what instructions he needs from his client and almost conducts his case for him.

The Agricultural Holdings Act, 1923, appoints its own judiciary,

that is to say, most matters under the Act are to be determined by an arbitrator appointed in accordance with the Act. But, once more, the county court is allocated as the controlling authority and there are provisions in the Act which draw the conveyancer, who deals with agricultural land, into close relation with the county court. Refer to section 16 of the Act which gives the arbitrator jurisdiction over agricultural tenants' claims for compensation, landlord's claims for breach of contract or waste or " any other question or difference of any kind whatsoever between the landlord and the tenant of [an agricultural] holding arising out of the termination of the tenancy of the holding, or arising . . . as to the construction of the contract of tenancy, and any other question which under this Act is referred to arbitration ". This is undoubtedly a wide jurisdiction unlimited by any consideration of the amount involved and, furthermore, the Supreme Court is not the overseer of the arbitrator. It is the county court which holds that position. The combined effect of section 16 (4) and paragraph 10 of the Second Schedule is that the arbitrator may, either on his own initiative or by direction of the county court upon application by either party, state in the form of a special case for the opinion of the county court any question of law arising in the course of the arbitration, and that opinion, subject to an appeal to the Court of Appeal, is final. Further, when an arbitrator has misconducted himself, it is the county court Judge who removes him or sets aside his award. Also any sum awarded by the arbitrator may be recovered through the county court—*any* sum, be it noted, no matter what the amount.

The County Court Rules, 1936 (for this purpose, Order XLI) and the Forms (Forms 23 and 343 to 346) are again of the greatest assistance to the conveyancer who, unfamiliar with the procedure of the county court, finds himself necessarily involved in it, as a result, perhaps, of a piece of his own drafting.

The Housing Act, 1936, is a consolidating Act embodying the 1925, 1930 and 1935 enactments. The relevant sections are those dealing with the orders of local authorities in respect of repair, demolition and closing of insanitary premises. The Acts relate only to working-class dwellings and were intended to give the local authorities wide powers for slum clearance, but Parliament forgot to mention that, when passing the Acts, and nowhere in the enactments does the word " slum " appear. Accordingly, the local authorities, especially in rural areas, have put the Acts to good (or, perhaps, bad) use, in the destruction of properties which, although not, perhaps, conforming with modern ideas of urban construction, have seen the birth and upbringing of at least a

vertebra or two of "the backbone of old England". It is essential, then, that the practitioner who has anything to do with the purchase, sale or management of cottage or villa property should appreciate the provisions of the Housing Act, 1936, and should appreciate too the body to whom he is to appeal when his client is dissatisfied with the decisions of the local authority. Section 15 of the Act is clear; it provides that any person aggrieved by certain notices, demands and orders may appeal to the county court.

Those notices, demands or orders are:—

(a) a notice requiring the execution of works to make the premises comply with existing bye-laws or to repair sanitary defects;

(b) a demand for the recovery of expenses incurred by a local authority in executing works specified in such notice when the owner has failed to carry them out;

(c) an order made by a local authority with respect to any such expenses;

(d) a demolition order;

(e) a closing order, or a refusal to determine a closing order; and

(f) a withholding of approval in relation to the use for any purpose of premises in respect of which a closing order is in force. Any person aggrieved by any of these may within twenty-one days after the date of the service of the notice, demand or order, or after the refusal as the case may be, appeal to the county court within the jurisdiction of which the premises to which the notice, demand or order relates are situate.

The section is important by reason of the conspicuous omission, namely, a clearance order. The difference between a demolition order and a clearance order is briefly that when the local authority can find only one house to demolish in any particular area, a demolition order must be made, from which an appeal lies to the county court; but, when the local authority can find more than one house, even though it is merely a building divided into two dwellings, a clearance order can be made (*i.e.*, the building can be declared to be "an area" which should be cleared of buildings) and the only method of appeal is a demand for an inquiry by an inspector of the Ministry of Health.

However, it is some satisfaction, at least, to find so many matters included in section 15 and made subject to the controlling influence of a judicial and not an administrative tribunal, for the orders which a local authority is empowered to make under the

Housing Act are of such vital importance to property owners (and, accordingly, to those who are called upon to advise property owners), amounting sometimes to deprivation of valuable real property, that it would seem only right and proper that the issue should be tried before an impartial tribunal and upon sworn testimony, neither of which essentials are present in Ministerial inquiries.

The Act gives further incidental jurisdiction to the county court, *e.g.*, for the collection of expenses incurred by the local authority in the execution of repairs or demolition, and Part VII of the Act gives to the county court certain powers closely affecting a conveyancer. They are briefly the following:—

Section 160—to determine, upon such terms as it thinks fit, the lease of any property in respect of which a demolition order or a clearance order has been made.

Section 161—to permit the execution of works or the demolition of buildings by one owner who, having suffered such an order against himself, is prejudiced by the default of another owner.

Section 162—to permit a person interested in land to enter for the purpose of carrying out works to render the house fit for habitation or to carry out a scheme of improvements or reconstruction sanctioned by the local authority.

Section 163—to lift any restrictive covenants so as to enable the conversion of a house into several tenements.

And now a brief reference to the Rent Restriction Acts, 1920–1939, the object and scope of which was to restrict the right of landlords to raise rents or to recover possession of dwelling-houses of low rental, but the result of which has been to present endless perplexities to the conveyancer and to drag his clients into litigation of the most difficult and troublesome type. It is not possible here to give consideration to the substantive law contained in the Rent Restriction Acts, but it is desired to draw attention to the manner in which the provisions of those Acts forge yet another link in the chain which draws together the conveyancer and the county court. For the Acts intrude even into the conveyancer's daily life. Look at the first requisition on almost all the printed forms of requisitions. Does it not ask pertinent questions about standard rents and notices of increase? And who is to decide any dispute over such matters? For answer, see section 11 (1) of the 1923 Act: "The county court shall have power on the application of a landlord to determine summarily any questions as to the amount of the rent, standard rent or net rent of any dwelling-house to which the principal Act [*i.e.*, the 1920 Act] applies or as to the increase of rent permitted under that Act or this Part of this [*i.e.*, the 1923]

Act." "Any dwelling-house to which the principal Act applies" means, since the 1939 Act, any dwelling-house of which the rateable value did not on May 16, 1939, exceed £100 in London, £90 in Scotland or £75 elsewhere. There are certainly a great number of such houses—enough to make them an important factor in any normal-sized conveyancing practice—and it is therefore important that the conveyancer should know something of the form of litigation which he is to pursue in the event of a dispute over the technical intricacies of the Acts.

Not only have the terms of the Acts to be mastered but there is a large body of Rules and a quantity of Forms to be studied if any true knowledge of the procedure is desired. The Rent Restriction Rules, 1920, with their several amendments, deal very fully with the procedure, giving directions even as regards matters which would naturally follow under the general County Court Rules and stating the powers of the Court and the orders to be made in various kinds of applications which may come before it.

And, certainly, those kinds of applications *are* various, for section 11 of the 1923 Act is not the only section which gives jurisdiction to the county court and over matters too with which the conveyancer is continually concerned. There are a number of other sections dealing with suspension or reduction of increased rent (section 2, 1920 Act), for amendment of a notice of increase (section 6, 1923 Act), for the calling in of mortgages to which the Act applies (section 7, 1920 Act), for deciding who are the surviving members of the tenant's family who are entitled to the benefit of the Act (section 12 (1) (g), 1920 Act), for the apportionment of the rent or rateable value of a building in which there is more than one dwelling-house (section 12 (3), 1920 Act, and section 4, 1933 Act), for a certificate that there was reasonable excuse for the failure to register a house as decontrolled (section 2 (2), 1933 Act), and finally that wide and general section of the 1920 Act, namely section 17 (2), which reads as follows: "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any other of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court." And, to make doubly certain that the case be brought in the county court, the section adds: "If a person takes proceedings under this Act in the High Court which he could have taken in the county court he shall not be entitled to recover any costs." So, although in ordinary circumstances any claim which gave rise to such questions would probably be within the county court jurisdiction by reason of the low rental

of the premises concerned, yet this section gives to the county court a further jurisdiction which it would not otherwise possess.

It is, of course, in claims for possession of premises that the Rent Restriction Acts most often come up for construction, criticism and application in the county court. Section 3 (1) of the 1933 Act now controls this subject. It is as follows: "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the Court considers it reasonable to make such an order or give such a judgment, and either—

(a) the Court has power so to do under the provisions set out in the First Schedule to this Act; or

(b) the Court is satisfied that suitable accommodation is available for the tenant or will be available for him when the order or judgment takes effect; or

(c) the Court is satisfied that the rent charged by the tenant for any sub-letting of a part was in excess of the recoverable rent of that part (section 4, 1933 Act)."

The First Schedule sets out a number of grounds upon which possession may be obtained without proof of alternative accommodation and they may be summarised as follows:—

(a) tenant's breach of any obligation under his tenancy, other than giving up possession;

(b) tenant's misconduct such as causing a nuisance to the neighbours;

(c) tenant giving notice to quit upon which the landlord has acted;

(d) assignment or subletting of the premises by the tenant without the consent of the landlord;

(e) tenant's misconduct of licensed premises;

(f) overcrowding which could by reasonable steps have been abated by the tenant (this provision is now found in the Housing Act, 1936);

(g) house required by landlord for a servant of his and either (i) the tenant occupied it by reason of service since determined or (ii) the person who is to occupy it is an agricultural worker and his occupation of it is necessary for properly working an agricultural holding;

(h) house required by landlord for himself, or his son, daughter, father or mother, provided that no greater hardship would be caused by granting the order or judgment than by refusing to grant it.

This consideration of the grounds upon which possession can be

obtained of controlled premises leads back to a section of the County Courts Act, 1934, which has already been mentioned, namely section 40 (1), and to a consideration of the jurisdiction of the county court over the recovery of land generally. In addition to the exclusion from the jurisdiction of the county court of questions of title, section 40 (1) excludes also any action for the recovery of land "except as in this Act provided". It is "in this Act provided" by section 48 (1) that "a county court shall have jurisdiction to hear and determine any action for the recovery of land where neither the value of the land in question nor the rent payable in respect thereof exceeds the sum of £100 by the year".

Prior to the County Courts Act, 1934, there were three forms of action for the recovery of land, each by virtue of a separate section of the County Courts Act, 1888. They were as follows: (1) under section 138 by a landlord for recovery of possession when the tenant's term or interest had expired or had been determined by notice to quit; (2) under section 139 by a landlord for recovery of possession upon non-payment of rent and insufficient goods on which to distrain; and (3) under section 59, an action for ejectment of a wrongful possessor of land, when neither of the two actions for recovery of possession were applicable to the facts of the case. One had to take care to bring one's action under the proper section, that is to say, to cross out on the printed plaint note the sections not applicable. Otherwise, any judgment obtained would be ineffective and if executed might give rise to a serious claim for damages. However, those distinctions are now gone and for all three forms of action is substituted the single form of action for recovery of land mentioned in section 40 (1) of the 1934 Act. The new form of action for recovery of land is a substantial reproduction of the old form of action for ejectment absorbing the actions (1) and (2) mentioned above; but, in the same way as, out of respect for the feelings of the subject one never speaks in law of a lunatic, but refers to him as a person of unsound mind, so out of respect for the feelings of a tenant, we must no longer speak of ejecting him; we must refer to our action as one for the recovery of land.

The provision as to the value of the land raises questions of importance. The "value of the land" means its actual marketable annual value, and not the value of the plaintiff's interest in it. On the other hand, the rent means the rent paid by the defendant, the amount he is receiving from a sub-tenant being quite irrelevant. If either this annual value or this annual rent exceeds £100, the case is not strictly within the county court jurisdiction and, if commenced in the county court may, under section 49 (1) on the

application of "the defendant or his landlord" (a peculiar phrase for the latter person might be the plaintiff who started the action in the county court) be transferred to the High Court on the grounds that the title to land of greater annual value than £100 would be affected by the decision in the action. But—and this is of considerable importance—if no such application is made or if no order for transfer is made upon such application, the county court has full jurisdiction to hear and determine the case. There is, therefore, in general, no need to take action in the High Court for recovery of land. Take the inexpensive and effective procedure of the county court and trust that the defendant will not apply for a transfer. If he does make such an application, the plaintiff is in no worse position than if he had started his action in the High Court—he is not, for example, penalised as to costs. This is surely a method of escape from the inconvenient High Court Rules relating to Mortgages, whereby all actions for possession by a mortgagee must be brought by originating summons in the Chancery Division. The effect of those Rules is that there is now no such thing as judgment for recovery of land in the High Court by default and one must go through the procedure of motion for judgment. Why not short-circuit those Rules by bringing the action in the county court upon the attornment clause, despite the fact that the annual value of the land exceeds £100, and rely on the protection of section 49 (3)?

The reverse form of transfer may be adopted under section 50 (1) and if an action for the recovery of land of which the annual value or rent does not exceed £100 is commenced in the High Court it may be transferred to the county court, provided, however, that it is an action of the old type under section 138 of the old Act, *viz.*, a claim against a tenant whose term has expired or has been duly determined by notice to quit.

Before turning to the Rules relating to actions for the recovery of land, a few miscellaneous provisions of the 1934 Act should be noted, namely:—

Section 179 under which a sub-tenant receiving a summons must forthwith give notice thereof to his lessor upon pain of forfeiture of three years' rent; and

Section 180 which deals with relief to a tenant in an action for forfeiture for non-payment of rent.

As regards this latter section, a tenant of any premises over which the county court has jurisdiction, who is in arrear with his rent, is given several opportunities of foiling a landlord's action for recovery, for when the action is to enforce a right of re-entry or forfeiture for non-payment of rent, it shall cease if the tenant pays

the rent in arrear and the costs of the action within five clear days of the return day. Furthermore, the judgment in such an action must be for possession within a certain time and not less than four weeks and if the tenant pays the rent in arrear and the costs within that time, the order is automatically rescinded. Finally, if the landlord has enforced his right of re-entry without recourse to litigation, the tenant may, within six months, apply to the county court for relief.

Now, briefly, with regard to the procedure under the relevant Rules, Order II, r. 2, provides that "Proceedings . . . shall be commenced in the court for the district in which the land or any part thereof is situate."

Order IV, r. 2 (c), forbids the joining, except by leave of the Court obtained before issuing the plaint, of any cause of action "with an action for the recovery of land except claims for mesne profits or arrears of rent or double the value of the land claimed or any part thereof or for damages for breach of any contract under which it is held or for any wrong or injury to it, or for payment of any principal money or interest secured by a mortgage or charge", or, by rule 3, for foreclosure or redemption of a mortgage. The circumstances would be exceptional when one would desire to join any other cause than those mentioned, but leave will be granted in such cases as a claim for the return of a deed relating to the land, a claim to recover personal property comprised in the same instrument as that relating to the land, or a claim for trespass and assault in relation to the possession of the land.

By Order VII, r. 3, the particulars of claim must give a full description of the land, and must state the annual value thereof and the rent (if any) and the grounds upon which possession is claimed.

When the summons has been issued, it may be difficult to serve it, but if it is an ordinary and not a default summons and it is not possible to serve it in the ordinary manner, Order VIII, r. 24, comes to the rescue and permits service by affixing the summons on a conspicuous part of the property. Having successfully served your summons you may find that you are faced with some defendant other than the person sued, for by Order XV, r. 10, any person who is in possession, either by himself or by his tenant, of the land or some definite part thereof, may by leave of the Court, obtained by filing the necessary affidavit five clear days before the hearing, be allowed to appear and defend.

At the trial it will be necessary to prove the right of the plaintiff to possession by, for example, the production of the lease or tenancy agreement showing the determination of the demise or tenancy. If

the claim is based on a notice to quit, such notice and the service of it must be strictly proved. It can be said, as a general rule of practice, that the county court Judges do not grant orders for possession without having the circumstances of the case put before them very fully, for the High Court Mortgage Rules, already mentioned, have put a check upon the granting of possession orders by default.

However, assuming the judgment has been obtained for recovery of the premises, it may be enforced by warrant, which may be issued upon the day named in the judgment, or, if no day is named, after the expiration of fourteen days from the day on which judgment is given (Order XXV, rr. 71, 72).

There are many other sections of the Act and many other rules which have a direct bearing upon actions for the recovery of land, but enough has been said to call attention to the main features of such actions, and to remind the conveyancer that he may often be called upon to spend a day or two in the county court proving matters necessary to be proved in possession claims. So often, a client is of the impression that he can turn a tenant out of a house in five minutes and many conveyancers suffer under a similar delusion. They soon learn differently when they endeavour to carry out their instructions.

Enough has been said, too, of the statutory provisions of the County Courts Act and other Acts, which draw the conveyancer into the county court, "like snail, unwillingly to school," to show that he cannot always escape the responsibilities of local litigation. But the subject cannot be left without mention of one further class of action—one in which the conveyancer is intimately concerned because it generally involves a criticism of his drafting, and yet one which has no special statute or provision and merely falls naturally within the county court jurisdiction if the amount claimed does not exceed £100. It is the familiar claim for dilapidations.

How many conveyancers, when they are drawing a repairing covenant in a lease, stop to think of the consequences? "Good and substantial repair and condition" is generally the phrase they use and then when it comes to the determination of the lease, their client, the landlord, wants to force the tenant to paint and paper the house throughout. Or from the other side, they approve the words "tenantable and decorative repair and condition", and then find that their client, the tenant, is sued in the county court for the cost of painting and re-papering.

The first step is obviously to put in a surveyor to inspect the house, for whichever party you are acting, but it is of little use to instruct the surveyor to report to you what dilapidations there

are without showing him the repairing covenant; even after you have shown him the repairing covenant it is not safe to leave it to him to construe it as he sees fit. Learned Law Lords have found difficulty in that construction and it is a little unfair to expect a humble surveyor to know exactly what is meant by any combination of "sufficientlies", "substantials", "necessaries", "tenantables" and "propers" that may have been used.

The practitioner will do well in such cases to advise the surveyor, tactfully, that there is no difference between such phrases as "good tenantable repair", "proper and substantial condition", "necessary and sufficient repair and condition", "habitable repair" and like phrases. They all mean simply this: Such a condition as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. The surveyor may have read *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42, and if so he will know that when such phrases have been used dilapidations do not include such painting as is only required for decoration; papering where the paper has merely worn or faded; whitewashing where in the ordinary course the ceilings have lost their whiteness; structural repairs, where the structure has worn out and requires to be replaced. He will also know that he must give consideration to the state of the premises when the lease started, and the practitioner should instruct him as far as possible on this point, especially if the character of the neighbourhood has changed during the period of the lease, for it has been held that "although the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repairs necessary for a house in Spitalfields", yet the fact that a district has deteriorated since the date of a lease does not justify the doing of repairs at a cheaper rate or of an inferior quality to that originally contemplated by the lease (*Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K. B. 716).

"To leave the premises in the same state of repair and condition as the same are now in (fair wear and tear and damage by fire excepted)", means little more than those phrases mentioned already, namely, to leave them in tenantable repair. It might almost be suggested that this phrase is implied into every covenant to leave premises in repair, for the Court will endeavour first to put itself in the place of a reasonably minded tenant taking the premises, and secondly to stop short of placing upon the outgoing tenant any liability for decorations necessitated by ordinary use.

If the Court is not to stop short at that point and if the tenant is to be liable for decorative or ornamental repairs, then it must be so stated in the covenant. That is the important point to which

consideration should be given when drafting or approving a repairing covenant. If you are acting for a landlord, put in the word "decorative" as nonchalantly and as inconspicuously as possible, and if the tenant's solicitor notices it, insist on it remaining. If you are acting for the tenant, obliterate the loathsome word or your client will suffer.

It is not only of importance that the conveyancer should know the authoritative meaning of the words he uses in drafting his documents, but, with regard to dilapidations, it is valuable to know the view which his local county court Judge takes of such claims. The definition of a "reasonably minded tenant" and the determination of the fine line between repairs and decorations is necessarily so vague and discretionary that an acquaintance with cases recently decided by the local county court Judge, showing whether he leans in favour of landlords or tenants, is of great assistance in considering what attitude to adopt in insisting or not insisting upon the inclusion of such words as "decorative" or "ornamental".

This example affords a convenient note upon which to conclude, as it is perhaps the best example that can be given of the practical difficulties confronting the conveyancer who takes no interest in county court litigation. Again and again he meets with points—and sometimes he overlooks them—which he could deal with more advantageously if he could visualise litigation ahead. Often, when litigation looms near at hand he may hesitate to advise his client to approach it or to let it approach him, because he has the expense and worry of High Court litigation in mind, whereas there may be a cheap and convenient solution close to hand in the county court.

POWERS OF APPROPRIATION.

By E. H. Bodkin, Barrister-at-Law.

The recent case of *Jopling* v. *Commissioners of Inland Revenue*, [1940] 2 K. B. 282, decides an important point in regard to the stamping of transfers pursuant to an appropriation of securities under the power conferred by section 41 of the Administration of Estates Act, 1925. It was there held that such a transfer to a legatee was chargeable with *ad valorem* stamp duty as a "conveyance on sale" within the meaning of section 64 of the Stamp Act, 1891. The decision proceeded on the ground that the

substance of such an appropriation is that the executor is assumed to have paid the legacy in money to the legatee, and the latter to have paid back the money to the executor as the consideration for the stock appropriated. That this is the true nature of the transaction had already been decided in *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210, though the question of what stamp duty is chargeable had been specifically determined only by an Irish Court, *viz.*, in *Dawson* v. *Commissioners of Inland Revenue*, [1905] 2 Ir. R. 69. It was contended in *Jopling* v. *Commissioners of Inland Revenue*, *supra*, that where a personal representative made an appropriation under the statutory power there was no contractual element in the transaction; but it was held that that power did not differ in any material degree from those powers which existed prior to the Act, and that the element of contract and consideration to support it subsisted, because the legatee in consenting to the appropriation discharged the executor from his obligation to pay in money.

It is clear that this element of sale also exists in all cases of appropriation under the power impliedly conferred by law on trustees holding on trust for sale (whether express or implied); the trustees in fact agreeing in exercise of the trust for sale to sell the property to the beneficiary against the money which they would otherwise have to pay him.

Where, however, there is no trust for, but only a power of, sale, there is no notional fund of money due to the beneficiary against which the value of the appropriated property can be set off, but only a mixed fund consisting of that value and the estimated value of his share in the other trust property; and it would appear to follow that the elements of a sale are lacking, and that consequently no *ad valorem* stamp duty is payable. In the case of a simple gift of property among certain persons, the trustees must, as was pointed out by Buckley, J., in *Re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681, arrive at equality as best they can, and the transaction should, it seems, be regarded as a division in specie. The same would, it is submitted, be true, even where there is a trust for conversion, when a particular asset is divided in specie among all the shares of the beneficiaries. The transaction would be analogous to a partition under section 28 (3) of the Law of Property Act, 1925, when the shares in the proceeds of sale have become absolutely vested. A partition is not a sale for the purpose of the Stamp Acts (see *Re Henniker*, 22 L. J. Q. B. 94) and is only chargeable with *ad valorem* stamp duty on money paid for equality of exchange under the express provisions of section 73 of the Stamp Act, 1891. It could not, it is submitted, be suggested

that conveyances made to carry out such a partition are now subject to *ad valorem* stamp duty merely by reason of the statutory notional conversion of the land.

When, however, the instrument creating the trust confers a power of appropriation without the consent of the beneficiary there is clearly no contractual element and no *ad valorem* stamp duty is payable (*Jopling* v. *Commissioners of Inland Revenue* (*supra*)). This may be so also in cases under the statutory power when no such consent is required. It follows that in all wills and settlements under which the trust property will or may become divisible in shares, it is expedient either to insert an express power of appropriation free from any consents, or to provide that the statutory power shall be exercisable without any of the consents thereby made requisite; and it may be advisable to do so even in wills which do not direct such division if legacies are given, and the testator possesses only investments of a nature not readily realisable.

Apart from the above question as to stamp duty the statutory power of appropriation conferred by section 41 of the Administration of Estates Act, 1925, and the power impliedly conferred on trustees by the general law require further consideration. The statutory power enables personal representatives (whether executors or administrators) to appropriate any part of the real or personal estate of the testator or intestate in or towards satisfaction of any legacy bequeathed by the deceased (including an annuity) or any other interest or share in his property, whether settled or not. The power is wider than that implied by law in that it permits (subject to certain consents being obtained) the appropriation of an investment not authorised by law or by the will.

When an infant has no parent or guardian the consent may be given on his behalf by the Court on the application of his next friend; but it is now unnecessary in most cases either to adopt this course or that of paying the legacy or share into Court under the Trustee Act (see *Re Salomons, Public Trustee* v. *Wortley*, [1920] 1 Ch. 290). The personal representatives can in the case of a pecuniary legacy or a share consisting of specific investments discharge themselves and, it seems, the residuary estate, under section 42 of the Administration of Estates Act, 1925, by appointing trustees of the infant's legacy or share and paying the money to them. If, however, the legacy is contingent, or is subject to a prior life interest, the section (as was decided in *Re Yerburgh, Yerburgh* v. *Yerburgh*, [1928] W. N. 208) does not apply. In the former case it may still be necessary either to apply to the Court to give the required consent under section 41 (1) (ii) (b) or to pay the money into Court. The section, however, appears to cover a case like

Re Salaman, De Pass v. *Sonnenthal*, [1907] 2 Ch. 46, where the legacy was expressly made payable with a fixed rate of interest exceeding that generally obtainable on trustee securities, *viz.*, 4 per cent. The personal representatives would not, however, it seems, be protected by section 42 if they first appropriated securities to the legacy and then transferred these to the trustees appointed. It appears also that, inasmuch as the application of section 41 is not expressed to be subject to a contrary intention, the power cannot be excluded by the will (though it may be extended). Consequently an appropriation thereunder would be effective, notwithstanding that the will contained a similar provision to that in *Re Salaman, supra.*

The personal representatives may under section 41 appropriate any part of the estate in its condition or state of investment *at the time of appropriation*; the difficulty suggested in *Re Salomons, supra, viz.*, that section 4 of the Land Transfer Act, 1897, did not apply to the appropriation of an investment made by the personal representatives themselves, is thus avoided.

The statutory power would appear in view of the generality of the language of sub-section (8) to apply to a contingent legacy in all cases where appropriation would not previously have been permissible; though it is arguable that it is not intended to override the clear principle laid down in *Re Oswald, infra.* It would not, however, extend to an interest not derived under the will, *e.g.*, an annuity covenanted to be paid by the deceased in his lifetime. The power appears to be confined to the period during which the personal representative holds the property in his capacity as personal representative; it is not, like the powers in section 39, expressed to be exercisable not only for purposes of administration but also during a minority, or the subsistence of a life interest, or until the period of distribution. It appears, therefore, to cease to be operative when the particular property becomes vested in the personal representative in his capacity as trustee, whether under the terms of the will or, in the case of an intestacy, under the Administration of Estates Act. This can only happen by virtue of an express or implied assent; it is immaterial whether the personal representatives do or do not remain such in regard to other assets. As to the £1,000 payable to the surviving spouse, whether this is regarded as a charge on the estate or as arising under the beneficial trusts, the power of appropriation must extend to it, since in the first case the payment or appropriation will be an act of administration, and in the second, an act made prior to assent (see *Re Ponder*, [1921] 2 Ch. 59; *Attenborough* v. *Solomon*, [1913] A. C. 70). The personal representative when *functus officio* will,

however, still have the powers which a trustee had prior to the Act in relation to personal estate, and in relation to land the power of partition conferred by section 28 (3) of the Law of Property Act, 1925.

Trustees have power *virtute officii* to appropriate authorised investments to the shares of the beneficiaries in the trust property, whether settled or not, without the consent of the latter, even if infants are interested: *Re Nickels, Nickels* v. *Nickels*, [1898] 1 Ch. 630. Where there is no trust for sale, such a power is, as we have seen, necessarily implied for the purpose of division; and if there is a trust for sale, it must generally be competent for the trustee to agree to sell the appropriated asset to the beneficiary against the money which he would otherwise have to pay him. The latter principle has been held in *Re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681, and *Re Wragg, Wragg* v. *Palmer*, [1919] 2 Ch. 58, not to be confined to pure personal estate, but to extend to chattels real and (even apart from section 28 (3) of the Law of Property Act, 1925) to real estate held on trust for sale.

But, except in cases where the beneficiary is *sui juris* and so agrees with the trustee, a valid appropriation can only be made by trustees of an investment which is either (1) authorised by law or by the instrument creating the trust, or (2) is by that instrument authorised to be retained unconverted throughout the trust. This was said in *Wragg* v. *Palmer, supra*, to be settled law, at any rate in a Court of first instance. The two classes represent in reality different aspects of the same principle, since, as was pointed out in *Fraser* v. *Murdoch*, 6 App. Cas. 855, a general power to retain stocks in which the testator has invested does not differ in scope from a general power to invest in those stocks. In some cases it may not be easy to determine whether a power to retain is one which lasts through the whole continuance of the trust, or is only a power at discretion to postpone realisation of investments which the trustees consider it undesirable for the time being to convert. Instances of the former are found in *Re Craven, Watson* v. *Craven*, [1914] 1 Ch. 358, and of the latter in *Fraser* v. *Murdoch* (*supra*) and *Re Brooke*, 76 L. T. 771. In *Re Cooke's Settlement, Tarry* v. *Cooke*, [1913] 2 Ch. 661, where there was a trust for sale when the trustees in their discretion thought fit, but no general power to retain, an appropriation was nevertheless approved. But, as was pointed out by P. O. Lawrence, J. (as he then was) in *Wragg* v. *Palmer, supra*, the case was one where a particular scheme of appropriation was under special circumstances authorised by the Court, and is not in conflict with the general course of authority.

A valid appropriation of securities could always be made by executors to answer a vested legacy payable *in futuro*; and the same was true when the legacy was defeasible, or even if it was contingent, provided it entitled the legatee to interest in the meantime (see *Re Tredwell*, *Jaffray* v. *Tredwell*, 65 L. T. 742; *Re Hall*, *Foster* v. *Metcalfe*, [1903] 2 Ch. 226; cf. *Colville* v. *Colville*, [1914] S. C. 255). But no valid appropriation could be made to answer a contingent legacy which does not carry the intermediate income, since the fund so appropriated would remain part of the general estate and not become the property of the legatee (*ibid.*). The difficulty appears to have been removed by section 41 (8) of the Administration of Estates Act, 1925. An appropriation to be valid must separate the fund completely from the estate, as appears from the old case of *Cooper* v. *Douglas* (2 Bro. C. C. 232), where an appropriation of stock by an executor to a legacy subject to a condition that part of the dividends should continue to be payable to him was held invalid. An executor might, however, always have set aside a fund to *secure* a contingent legacy, and, though this would not amount to payment, he would not be liable for subsequent depreciation provided he acted reasonably and before distributing the residue set aside an ample sum; though the residue would still remain liable in the hands of the residuary legatees (see *Re Hall*, *supra*; *Re Salaman*, *De Pass* v. *Sonnenthal*, [1920] 1 Ch. 290). In *Re Kirkley*, *Halligey* v. *Kirkley*, 87 L. J. Ch. 247, where legacies were given contingently upon the legatees attaining twenty-one, with interest at 4 per cent. until payment, the Court directed the setting aside and investment of a sufficient sum to answer the legacies and 4 per cent. interest thereon for each year until each legatee respectively attained his majority, the dividends in the meantime to be paid to the residuary legatee. The usual course in an administration action, as appears from *Webber* v. *Webber* (1 S. & S. 311) is to direct payment of the whole residuary estate to the residuary legatee on his giving security for payment of the legacy.

The principle of *Re Hall* (*supra*) is, however, as Peterson, J., pointed out in *Re Oswald*, *Oswald* v. *Oswald*, [1920] W. N. 22, that in the simple case of a cash legacy to A B on his attaining twenty-one, the legatee is entitled when he attains his majority to payment in cash, and is not obliged to accept appropriated securities which may have depreciated in value. Where, however, as in that case, there is a gift of a trust legacy which amounts to a direction to stand possessed of a sum for the legatee on his attaining twenty-one, and not on his attaining twenty-one to stand possessed of that sum for him (in which case his right is to require

payment of that sum in cash on attaining his majority), there is in effect a direction to appropriate which would (apart from the statutory power) exonerate the trustees from liability if they appropriate investments which depreciate before the legacy becomes payable.

The question whether trustees for sale can appropriate securities to their own interests, or the interest of one of themselves, in the trust property does not appear to be wholly free from doubt. Such a transaction when it in substance constitutes a sale would fall within the equitable principle which renders a sale by a trustee to himself voidable at the suit of the *cestuis que trust*. It has, however, been suggested that it might be supported as a notional sale of the whole trust property by the trustee in the open market and a re-investment in the same securities of so much of the proceeds of sale as represent the trustee's share (see an article in 50 S. J. 417). Such a re-investment (provided the securities were authorised by the trust instrument or the general law) would be within the powers of the trustees, as appears from the statement of Romer, L.J., in *Re Hall*, [1903] 2 Ch. 226, that once the share of a person unable to give a receipt for it has been realised, the trustees would have power to invest the proceeds for the beneficiary without his consent. It would appear to be necessary to resort to some such fiction as a notional sale and re-investment in order to justify an appropriation by trustees for sale in all cases, *e.g.*, infancy, in which the consent requisite to constitute a sale cannot be obtained. In *Re Beverley*, *supra*, trustees for sale were declared to have the power to appropriate investments to the share of one of themselves, and no question as to the sale being impeachable on equitable principles was raised. (The facts of this case are more clearly stated in the report in the Law Journal Reports, 70 L. J. Ch. 295.) In *Re Bythway*, 80 L. J. Ch. 240, an appropriation by an executor of shares having no ascertainable value to his own legacy at his own valuation was held invalid as against a person claiming the legacy under the executor's will; but this decision was apparently on the ground that the shares were incapable of valuation.

Under section 33 of the Administration of Estates Act, 1925, the estate of an intestate is now held on trust for sale, and under section 39 the duties of trustees for sale are imposed on the executors of a testator; so that in either case the disability in equity of trustees for sale to purchase the trust property would appear to subsist. The cases of *Elliott* v. *Kemp*, 7 M. & W. 306, and *Barclay* v. *Owen*, 60 L. T. 220, from which it appears that an appropriation of securities, or, it seems, of chattels by an

administrator to his own share as next-of-kin is valid do not therefore apply since the Act. An appropriation by co-trustees not holding on trust for sale to the interest of one of themselves was held valid in *Re Richardson*, [1896] 1 Ch. 512, there being no element of sale in the transaction.

Section 41 of the Administration of Estates Act, 1925, which replaces section 4 of the Land Transfer Act, 1897, may, however, have removed the disability (if any) of personal representatives as trustees for sale to appropriate to their own shares. This section is not, like section 72 of the Law of Property Act, 1925 (which validates conveyances by personal representatives to one of themselves) expressed to be subject to the equitable principle and there appears to be nothing so to limit the generality of its wording.

To sum up the argument, the result appears to be that an appropriation by trustees for sale to their own shares is valid, at any rate if the securities appropriated are authorised by the trust instrument or the general law; and *a fortiori* is such an appropriation good when made by personal representatives under the statutory powers.

An appropriation may be made in respect of some only of the shares in the trust property, or as regards only part of such property (see in *Re Richardson*, *supra*, *Re Nickels*, *supra*). It does not require to be evidenced by writing or made with any particular formality. In *Re Lepine*, *supra*, the mere handing over of a mortgage deed to a beneficiary and letting him into receipt of the interest was held to constitute a valid appropriation of the mortgage to his share; and in *Re Richardson*, *supra*, the making of a note of the appropriation in the trust accounts and payment to the respective beneficiaries of the interest on the securities appropriated to their shares was held to have the same effect. Though it is a breach of trust to invest the proceeds of securities already appropriated to separate legacies upon one mortgage, there would not be the same objection to an original investment on one mortgage of an entire fund out of which legacies were payable (see *Walker* v. *Walker*, 62 L. T. 449).

When once a valid appropriation has been made, the beneficiary takes the property for better or worse, and the other beneficiaries have no right to resort to it if the remaining assets become subsequently depreciated; see in *Re Waters*, *Preston* v. *Waters*, [1889] W. N. 39; in *Re Lepine*, *supra*. See, however, in *Re Rivers*, *Pullen* v. *Rivers*, [1920] 1 Ch. 520, where the plaintiff was not a party to the proceedings in the administration action. And if the executors have appropriated securities to a legacy they will have no right of recourse thereto for a debt due by the legatee to the

estate of which they had notice when they made the appropriation (see *Ballard* v. *Marsden*, 14 Ch. D. 374). On the other hand, as appears from *Hadley* v. *Davis*, 28 L. J. Ch. 875, and *Att.-Gen.* v. *Lawes*, 8 Hare 43, the appropriated fund must bear the cost of appropriation and of any subsequent proceedings relative to the legacy. But a legatee is not entitled to receive more than his legacy with 4 per cent. interest until payment even when there has been no appropriation and the residue has in the meantime appreciated in value and produced a higher rate of interest and when the executor is also himself residuary legatee (see *Re Campbell, Campbell* v. *Campbell*, [1893] 3 Ch. 468).

As was pointed out by Fry, J. (as he then was) in *Re Lepine*, *supra*, a trustee who appropriates securities worth 20s. in the £ to one share and rubbish not worth its nominal value or the value at which the beneficiary takes it to another, is guilty of a breach of trust, and the beneficiary who takes the good securities with notice may also be made liable to refund. Thus, in *Re Brookes*, 58 Sol. J. 286, trustees were held liable in respect of a worthless mortgage which they had appropriated without inspecting the mortgaged property.

When gilt-edged securities are appropriated by trustees under their implied power, they will run no appreciable risk, even where infants are interested, as was pointed out in *Re Nickels*, *supra*. But as regards other property they may be wise to apply to the Court to authorise the appropriation where the consent of the beneficiaries cannot be obtained.

Under the statutory power, however, personal representatives may ascertain and fix the value of the respective parts of the deceased's real and personal estate and his liabilities as they shall think fit, and where necessary they must for this purpose employ a duly qualified valuer. It appears that when the personal representatives have made such a valuation they would, in the event of insufficiency or depreciation of the property appropriated, be entitled to relief under section 61 of the Trustee Act, 1925. If the appropriation is made with the consent of the person nominated by section 41, they would not in any case be liable to an action by that person.

A valuation would not be required in the case of securities quoted on the Stock Exchange; such securities could be safely appropriated at the middle price on the relevant date, which under the statutory power is the date of appropriation; *Re Charteris*, *Charteris* v. *Biddulph*, [1917] 2 Ch., at p. 386. As regards other property it would not usually be safe to rely on a valuation made for another purpose, *e.g.*, a valuation for probate, which is, as is

well known, based on a knock-down sale, and though often adopted in practice does not represent the true value.

The effect of appropriation under the statutory power is, as is pointed out by the learned editors of *Wolstenholme and Cherry's Conveyancing Statutes* in their note on section 41 (2), to render the security an authorised investment; consequently, even if it be a hazardous or wasting security producing a high rate of interest, there will be no apportionment as between the tenant for life and remainderman. The personal representatives would therefore if they appropriated such a security be unduly favouring the tenant for life contrary to sub-section (5). The Court will not in general interfere with the exercise of trustees' discretion when they have express power in their discretion to postpone appropriation, though it might perhaps, as in cases where there is an implied power of appropriation, direct a division of those assets which are divisible in specie (see *Prendergast* v. *Prendergast*, 3 H. L. C. 195; *Re Charteris, Charteris* v. *Biddulph*, [1917] 2 Ch. 379). It was held in *Re Clarke, Barker* v. *Perowne*, 18 Ch. D. 160, that when securities on which dividends have accrued are purchased by trustees and appropriated to answer a settled legacy, there is no apportionment, and the tenant for life is entitled to the whole of the dividends. When the interest in respect of which the appropriation is made does not carry the intermediate interest, no interest appears to be payable merely by virtue of the appropriation (cf. *Re Raine*, [1929] 2 Ch. 58).

THE FINANCE ACT, 1941, AND THE FARMER.

By Leonard Stein, Barrister-at-Law.

The provisions of the Income Tax Acts with regard to the taxation of profits arising from the cultivation of land have been drastically modified by sections 10 and 11 of the Finance Act, 1941. The purpose of this article is to describe as simply as possible the main features of the new legislation. It should be clearly understood that what follows does not purport to be an exhaustive commentary.

The normal method of taxing profits arising from the cultivation of land has hitherto been by way of an assessment under Schedule B, the tax being charged on a notional profit measured

by the annual value of the land. If the actual profits of any year fell short of the annual value, the farmer was entitled to be charged under Schedule B on the actual profits. He was also entitled, if he so desired, to be taken out of Schedule B altogether and to be dealt with under Schedule D on the footing that he was carrying on a trade. Market-gardening was reserved for special treatment. The assessment was under Schedule B, but the profits were required to be computed as the profits of a trade are computed for the purposes of Schedule D.

Like the Rules of Schedule B, the 1941 Act distinguishes between market-gardening and other forms of cultivation. In language closely following that of Rule 8 of Schedule B, subsection (2) of section 1 of the 1941 Act defines "market-garden land" as meaning "land occupied as a nursery or garden for the sale of the produce (other than land used for the growth of hops)," and provides that "market-gardening" shall be construed accordingly. "Farm land", on the other hand, means "land wholly or mainly occupied for the purposes of husbandry not being market-garden land" and "farming" is to be construed accordingly. The effect of the 1941 Act on the taxation of profits arising from market-gardening will be dealt with later. The most drastic changes are those affecting "farming" as distinct from "market-gardening", and these will be considered first.

As will be seen in due course, those who may be described for the moment as the smaller farmers will be unaffected by the new legislation and will remain in the same position as at present. In all other cases, farming profits will in future (commencing with the year of assessment 1941–42) be taxable as the profits of a trade under Case I of Schedule D, and will fall to be computed in the same way as the profits of any other trade are required to be computed for the purpose of a Case I assessment. All farming carried on by any particular person or partnership or body of persons will be treated as one trade. There will be no question of each farm being treated as a separate unit, nor will it make any difference whether the various farms, if more than one, are geographically contiguous or not.

The profits for any year of assessment will be computed, in the usual way, on a preceding year basis, and the cesser and commencement provisions of the Income Tax Acts will apply in the same way as in the case of any other trade. For the purpose of applying the preceding year principle and the cesser and commencement provisions, the farmer will be treated as though he had always been carrying on a trade, irrespective of the Schedule under which he was, in fact, assessed before the enactment of the

1941 Act. Let it be supposed, for example, that X, a farmer within the scope of section 10 of the 1941 Act, has hitherto been assessed under Schedule B. By virtue of the 1941 Act, he now becomes assessable under Case I of Schedule D. In the computation of his Case I profits for 1941–42, the fact that his farming profits have not hitherto been treated as the profits of a trade will not cause him to be dealt with on the footing that he set up or commenced the trade of farming at the commencement of 1941–42. His Case I profits for 1941–42 will be measured by the profits of the preceding year as though he had been carrying on a trade all along, and it will make no difference that in the preceding year he was not, for tax purposes, carrying on a trade. Again, let it be supposed that X is at present within the category of smaller farmers excluded from the operation of section 10 of the 1941 Act and that he continues for several years hereafter to be taxable in accordance with the rules of Schedule B. As a result of his having acquired more land, or for some other reason, he subsequently passes out of the excluded category so as to be taxable for (say) 1945–46 under Case I. He will not be treated as having set up or commenced a trade when he passed from Schedule B to Schedule D, and his profits for 1945–46 will be computed on a preceding year basis, notwithstanding that for the preceding year he was taxable under Schedule B and not under Schedule D.

Where farming profits are taxable, by virtue of section 10, under Schedule D, losses may be carried forward as provided in section 33 of the Finance Act, 1926, in the same manner as in the case of any other trade. Provision is made for the application of section 33 of the 1926 Act to farming losses sustained in the six years before 1941–42. Where, by virtue of the 1941 Act, a farmer is chargeable for 1941–42 under Schedule D, pre-1941–42 farming losses will be deductible in the computation of the farming profits for 1941–42, or any later year, to the extent to which they would have been deductible if the farmer had all along been carrying on a trade and had the benefit of section 33 of the 1926 Act. Let it be supposed, for example, that on a Case I computation, the farming would have shown a loss of £2,000 for 1939–40 and a profit of £1,000 for 1940–41. The application of section 33 of the 1926 Act would have left an unexhausted loss of £1,000 to be carried forward from 1940–41. For 1941–42, when the 1941 Act brings the farmer within Schedule D, there is a farming profit of (say) £500. He will be entitled to set off against this profit £500 of the £1,000 unexhausted loss, leaving a loss of £500 to be carried forward in the usual way.

As already explained, the Case I assessment will be on the usual preceding year basis, notwithstanding that in the preceding year the farmer was not, for tax purposes, carrying on a trade. But, so far as 1941–42 is concerned, the general rule is subject to a qualification contained in section 10 (6) of the 1941 Act. If the actual profits of 1941–42 can be shown to be less than the statutory profits computed on the preceding year basis, the tax payable for 1941–42 will be adjusted to conform to the actual profits of that year, provided that a claim to that effect is made not later than April 5, 1943. Such adjustment can be demanded only by an individual or a partnership of individuals. A claim under section 10 (6) cannot be made by a body corporate.

So far as farming profits are concerned, the main features of section 10 of the 1941 Act have now been reviewed. Farming profits will, however, be exempt from compulsory assessment under Schedule D in cases satisfying the conditions specified in section 11. No such exemption will be obtainable by bodies corporate, section 11 being concerned solely with individuals and partnerships of individuals. In order to ascertain whether an individual can take advantage of section 11, it will be necessary to look first at the annual value of his farm land in the "relevant period", by which is meant the twelve months immediately preceding the year of assessment in question. To this must be added the annual value of his market garden land (if any) in the "relevant period". If he is a member of a partnership, the appropriate part of the partnership's farm and market garden land in the "relevant period" will enter into the computation, the appropriate part being a part proportionate to the individual's share, for the "relevant period", in the partnership income. For this purpose, "annual value" means the gross annual value for the purposes of Schedule A before deducting the repairs allowance. If the result of the computation is a figure not exceeding £300, then for the year of assessment in question the farming profits will be outside the scope of section 10 of the 1941 Act, and, so far as his farm land is concerned, the individual will be in the same position as though the 1941 Act had not been passed—in other words, he will be assessable under Schedule B unless he exercises his right to elect for assessment under Schedule D. If, by virtue of section 11, an individual is assessed under Schedule B in respect of farm land for 1941–42 or any subsequent year of assessment, any farming loss sustained in an earlier year will not be allowed to be carried forward under section 33 of the 1926 Act. The result of the Schedule B assessment will be that any unexhausted loss will, in effect, be automatically wiped out.

It has already been made clear that section 11 has no application to bodies corporate. As to partnerships of individuals, section 11 does not apply where any of the partners carries on farming in the year of assessment in question in such circumstances that, on a computation made as already described, he is found not to be within the £300 limit. Save where a partnership of individuals is debarred on this account from benefiting by section 11, that section will apply to it as they apply to an individual; in other words, subject to what has just been said as to the members of the partnership as individuals, the test will be whether the aggregate gross annual value of the partnership's farm and market-garden land is within the £300 limit.

From farming we now pass to market-gardening. By reason of Rule 8 of the Rules of Schedule B, market-gardening profits, though hitherto assessable under Schedule B, already fall to be computed in the manner in which trading profits are required to be computed for the purposes of Schedule D. Hence, no drastic change is involved in the provision now made by section 10 of the 1941 Act for the treatment of market-gardening as a trade and the taxation of the profits under Case I of Schedule D. As in the case of farming profits, the Case I assessment in respect of market-gardening profits will be made as though a trade within the scope of Case I had been carried on all along, and not on the footing that a new trade was set up or commenced at the moment when, by virtue of the 1941 Act, the profits were taken out of Schedule B and brought within the scope of Schedule D.

The concessions in favour of the smaller farmers in section 11 of the 1941 Act relate exclusively to farming within the meaning of that Act and have no application in relation to market-gardening profits. These will, in all circumstances, be treated as the profits of a trade and charged accordingly under Case I of Schedule D.

Where farming and market-gardening are carried on by the same person, each will be a separate trade for the purposes of income tax. It will not, therefore, be possible for farming losses carried forward under section 33 of the 1926 Act to be deducted from market-gardening profits, or *vice versa*. On the other hand, advantage can be taken, if desired, of Rule 13 of the Rules of Cases I and II of Schedule D, which enables a person carrying on two or more distinct trades to set a loss sustained in one against the profits of one or more of the others.

WAR DAMAGE AND SHORT TENANCIES.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

It is proposed in this article to consider the new code of law introduced by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, for dealing with cases of war damage to land comprised in a short tenancy.

" Short tenancy " is defined by section 1 (10) of the new Act as meaning " any tenancy or sub-tenancy which the tenant is entitled to determine at any time by a notice expiring not later than the end of the next complete quarter or the next complete period of three months of the tenancy ". The expression also includes certain statutory tenancies, such as under the Rent Restrictions Acts, in cases where the tenant who is holding over under the statute previously held a short tenancy within the above definition.

It is important to distinguish accurately what is a " short tenancy " in order to know whether the tenant can rely on the simplified procedure provided by the 1941 Act or whether the machinery of notices of disclaimer and retention must be employed under the principal Act.

The key to the meaning of " short tenancy " seems to lie in the words " entitled to determine *at any time* ". In order that the tenancy should be a " short tenancy " the tenant must be able at any time during the tenancy to determine his interest by serving such a notice as is described in the definition. Thus the ordinary weekly and monthly tenancies, terminable by a week's or a month's notice expiring at the end of any week or month of the tenancy (which of course will occur within the next complete period of three months of the tenancy) are within the definition. So also are quarterly tenancies terminable by one quarter's notice expiring at the end of any quarter applicable to the tenancy. But a yearly tenancy terminable by six months' notice expiring at the end of a year of the tenancy is not a short tenancy because at no time can the tenant determine it by a notice " expiring not later than the end of the next complete quarter ". Even a yearly tenancy determinable at the end of any year of the tenancy by one quarter's previous notice is not within the definition, because it is only at one season of the year, and not *at any time*, that the tenant can determine it by such a notice as is specified in the

Act. On the other hand, a tenancy from year to year, or even for a term of years, which the tenant could determine *at the end of any quarter or period of three months of the tenancy* by giving a quarter's notice or less, would be within the definition of "short tenancy".

The criterion is therefore not the length of the tenant's interest, which may vary from a weekly tenancy to a term of years, but his ability to determine it at any time by a notice of not more than one quarter in length expiring at the end of any quarter day applicable to the tenancy or at any other recurrent interval not exceeding three months.

This leads on to a more difficult problem of construction arising under this definition of "short tenancy". Evidently a tenancy for a fixed term, however short (for example, three months or even one month), is not a "short tenancy" within the Act, for it is not determinable by the tenant at all, but will run for its appointed duration unless forfeited under a clause of re-entry. So also a tenancy for the duration of the war (*Great Northern Ry.* v. *Arnold* (1916), 33 T. L. R. 114) is not a "short tenancy". Now a demise for one year, and so on from year to year, creates a tenancy for two years at the least, determinable at the end of the second or any subsequent year by notice expiring at the end of such year: *Doe* d. *Chadborn* v. *Green* (1839), 9 A. & E. 658; *Cannon Brewery Co.* v. *Nash* (1898), 77 L. T. 648; *Re Searle*, [1912] 1 Ch. 610. The same principle has been applied to a letting for six months, and so on from six months to six months: *R.* v. *Chawton* (1841), 1 Q. B. 247. Evidently the principle will apply to a letting for one quarter and so on from quarter to quarter, or even for one month and so on from month to month. Can a tenancy which commenced in this way be described as a short tenancy? In the opinion of the writer it can, provided that the tenancy is such that it would be true to say that *at any time after its commencement* the tenant could have determined it by such a notice as is described in the definition. A tenancy of this kind gives one time of continuance, that is to say, gives rise to one cumulative term which gradually increases in length until it is determined by notice to quit (*Woodfall*, 24th ed., p. 268; *Cattley* v. *Arnold* (1859), 1 J. & H. 651). It is one term, not one term followed by another and another. So if the term were limited originally for six months certain, though it were limited thereafter from quarter to quarter or even from month to month, it cannot be regarded as a "short tenancy", even during its latter stage when it is running on from quarter to quarter or from month to month, because during its first three months the tenant could not

have determined it before it had run for six months and a quarter, or six months and a further month, as the case might be.

The writer recognises the possibility of arguing that after the initial period of six months or more certain has run one should look at the question whether the tenant is *now* entitled to determine the tenancy in the manner described in the Act; but it is submitted that this view is erroneous, because it involves the supposition that one and the same tenancy might be a "short tenancy" at one time and not at another, which is absurd. Either a tenancy is wholly and for its entire duration a short tenancy, or it is not; and a tenancy of the kind now under consideration fails this test, and is therefore not a short tenancy.

Accordingly a tenancy for six months or more certain, and thereafter from six months to six months, or from quarter to quarter, or from month to month, or from week to week, is not a short tenancy. Sometimes it suits the convenience of parties to create a tenancy for, say, five months certain and thereafter from quarter to quarter. This is not a short tenancy because during its first two months the tenant cannot determine it until six months hence, which is beyond the limit prescribed in the definition. On the other hand a letting for two months certain and thereafter from quarter to quarter is a short tenancy because right from its commencement it could be terminated by the tenant by a notice expiring at the end of the next complete quarter.

Enough examples have been cited to show how in the opinion of the writer this definition applies in practice.

Of course if such a tenancy be determined by notice to quit and replaced by a plain weekly, monthly or quarterly tenancy, the new tenancy will be a short tenancy. If the original tenancy were subject to the Rent Restrictions Acts, a notice of increase of rent would under the Rent Restrictions (Notices of Increase) Act, 1923, s. 1, have the same effect, for it would operate as a notice to quit determining the previously existing tenancy.

A notice to quit served on a tenant who is entitled to the benefit of the Rent Restrictions Acts operates to turn his tenancy into a statutory tenancy. If his previous contractual tenancy were a short tenancy, then by the express terms of the 1941 Act the tenant so holding over is deemed to be holding under a short tenancy. If the previous contractual tenancy were not a short tenancy, then the ensuing statutory tenancy must be examined on its merits to see whether it is a short tenancy. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), the tenant can give up the statutory tenancy by giving such notice as would have been requisite under the contractual tenancy, or if no such notice

would have been required by giving three months' notice. It follows that the statutory tenancy will always be a short tenancy, whether the previous contractual tenancy was so or not, unless the period of notice requisite under the contractual tenancy and thus imported into the statutory tenancy is so long (for example, six months) as to take the case out of the definition of a short tenancy.

It is not required that the notice which a tenant is entitled to serve to determine a short tenancy should be a notice to quit in the proper sense of the word. A lease for fourteen years determinable by the tenant upon any of the usual quarter days by serving upon the landlord one quarter's previous notice of his election to determine the lease is a "short tenancy", a notice served under the option to determine falling within the words of the definition.

A tenant holding over land which he previously held on a short tenancy, by virtue of the Courts (Emergency Powers) Acts, 1939 to 1941, is deemed to be holding under a short tenancy. This raises another interesting point of construction. A tenant whose lease is forfeited for non-payment of rent is by section 1 (3) of the Courts (Emergency Powers) Act, 1939, entitled to hold over until the landlord obtains leave to enforce his order for recovery of possession. His position is regularised by section 1 (2) of the Amendment Act of 1940 which provides that until the landlord obtains such leave his lease is deemed not to be forfeited. Nevertheless his title to hold on, *i.e.*, his right to say that the forfeiture is suspended, arises by virtue of the Courts (Emergency Powers) Acts, so he is holding over under those Acts within the meaning of the definition of "short tenancy". However, this seems to the writer to add nothing to what is comprised within the expression, because *a priori* his previous interest was a short tenancy, and the forfeiture being suspended the previously existing short tenancy continues in force so long as the order remains unenforceable.

A further provision in the definition of "short tenancy" is that a person holding over land which he previously held under a short tenancy, by virtue of the Liabilities (War-Time Adjustment) Act, 1941, is deemed to be holding the land under a short tenancy. A scheme of arrangement under that Act may include a provision enabling the debtor to remain in possession of any premises. Provision for the payment of rent, despite the claims of other creditors, will in such case be included in the scheme, but the scheme may reduce the rent, though not below the lettable value and not unless that value has fallen as a result of the war : see

section 6 (1). No provision is included, however, to permit the debtor to hold over after his contractual tenancy of the premises has come to an end, and although the view has been expressed that such a power can be exercised in adjustment proceedings (see *The Conveyancer*, Volume 6, p. 45), it seems to the writer that the absence of any such express power in the Act means that the Court cannot compel the landlord to permit the tenant to continue in possession after his contractual tenancy has come to an end, unless the tenant is so entitled under the Rent Restrictions Acts or other emergency legislation. If this view be correct, it is difficult to understand how a tenant can be said to be holding over under this Act. By section 26 the same Act enables a tenant against whom an order for recovery of possession for non-payment of rent has been obtained to apply for the protection afforded by the Courts (Emergency Powers) Acts notwithstanding that his contract of tenancy was entered into after the outbreak of war; the Court must be satisfied that his inability to pay the rent is due to circumstances attributable to the war and arising after the lease was entered into. A tenant who obtains the benefit of this provision is then placed in the position of a tenant holding over under the Courts (Emergency Powers) Act—a position which has been considered in a preceding paragraph.

In relation to short tenancies the whole machinery of the Landlord and Tenant (War Damage) Act, relating to notices of disclaimer and retention, is swept aside, and the simple provision made instead that where for any period land let on a short tenancy is unfit by reason of war damage and is not occupied either in whole or in part by the tenant, no rent shall be payable under the tenancy in respect of that period. There is no need for the tenant to serve any notice on the landlord, and if the land is unfit no notice served by the landlord can avoid the operation of this section. "Land" is defined in the principal Act as meaning land of any tenure and as including buildings or works situate on, over or under land.

Simple as this provision is, it raises a number of points of which the first is, when is the land let on the short tenancy to be considered "unfit by reason of war damage"?

The definition of "war damage" contained in the Landlord and Tenant (War Damage) Act, 1939, is now abolished for all purposes, and in its place the definition contained in section 80 of the War Damage Act, 1941, is made applicable to the Landlord and Tenant (War Damage) Acts. "War damage" means accordingly (a) damage occurring (whether accidentally or not) as the direct result of action taken by the enemy, or action taken in

combating the enemy or in repelling an imagined attack by the enemy; (b) damage occurring (whether accidentally or not) as the direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate, the consequences of such damage as aforesaid; (c) accidental damage occurring as the direct result (i) of any precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by the enemy, or (ii) of precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action, being in either case measures involving a substantial degree of risk to property; paragraph (c) does not include the imposing of restrictions on the display of lights or measures taken for training purposes. This definition is much more comprehensive than the one previously having effect under the Landlord and Tenant (War Damage) Act, and the advantage of having a standard definition of war damage in legislation dealing with the subject is obvious.

Unfitness by reason of war damage is still governed by section 24 of the principal Act. "Unfit" means: (a) in relation to buildings or works, or land of which three-quarters or more of the value is attributable to buildings or works, unfit for the purpose for which those buildings or works were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit for that purpose, to the standard of accommodation available at the material time and to all other circumstances; and (b) in relation to other land, unfit for any purpose for which the tenant can reasonably be expected to use the land, having regard to the terms of the lease under which it is held. Conversely, land is "fit" if it is not unfit within the above definition.

A building is "unfit" within the above definition if some repairs need to be carried out before the building will be fit for the purpose for which it was used or adapted for use immediately before the occurrence of the war damage, even though the premises can be made suitable for their purpose by the expenditure of a trivial sum: *Boudou* v. *Thornton-Smith* (1941), 57 T. L. R. 387.

A dwelling-house let on a short tenancy is, however, deemed to be fit if it has been repaired to such extent as is reasonably practicable at the time, having regard to the circumstances prevailing in the locality, and as is sufficient to render the dwelling-house reasonably capable of being used for housing purposes, and continues to be in that state of repair (1941 Act, s. 1 (4)). The

practical effect of this seems to be that the dwelling-house becomes "fit" as soon as it has been made habitable, though its condition may now be such that it would not be taken by the same class of tenant nor command the same rental as before. Differences of opinion may be anticipated as to what degree of repair is necessary to render a dwelling-house "reasonably capable of being used for housing purposes".

If the local authority issue a certificate that the dwelling-house has been repaired to that extent, the production of the certificate will, under section 1 (5), be sufficient evidence that the house was fit unless the contrary is proved. But after three months the tenant may require the local authority to inspect the house, and if they are satisfied that (a) further repairs have become reasonably practicable since the issue of the certificate and have not been carried out; or (b) the works of repair carried out before the issue of the certificate have not been maintained in a reasonably efficient state—they are required to revoke the certificate, serving notice of the revocation on the tenant and the landlord, and thereafter the notice is *prima facie* evidence that the dwelling-house is unfit. The local authority may appoint an officer to exercise these functions, and an instrument purporting to be such a certificate and to be signed by such officer is deemed to be a certificate duly issued, unless the contrary is proved.

The landlord or tenant of any land let on a short tenancy may at any time apply to the county court to determine whether the land is or was at any time unfit by reason of war damage (section 1 (7)).

Now the Act says that the provisions relating to rent come into operation where for any period *any* land let on a short tenancy is unfit by reason of war damage. This is in contrast to the words used in the principal Act, which speaks of *the* land comprised in a lease being "unfit by reason of war damage". The words used in relation to short tenancies, taken by themselves, would seem to infer that the provisions of the section apply if part only of the land let is unfit, as well as in the case where the whole of it is unfit. Yet the section goes on to say that no rent shall be payable under the tenancy in respect of that period, which clearly means that no rent is to be paid in respect of the tenancy at all. The next sub-section deals with the case where the tenant occupies land or part of it, while *the* land is unfit, and provides for apportionment of rent in such case, but the draftsmen of the Act seem to have overlooked the possible case of part only remaining fit and the tenant continuing to occupy that part only. Possibly the Courts will infer, construing the two sub-sections together, that the

intention of the Act is that in such case the tenant shall pay such rent as may be agreed or, in default of agreement, as may be fixed by the Court. Sub-section (7) expressly gives the county court jurisdiction to hear an application on any question arising under this section in relation to the tenancy.

The relief afforded by the Act to the tenant of a short tenancy is that no rent shall be payable by him while the unfit land is not occupied either in whole or in part by him (sub-section (2)). The qualification providing for payment of a modified rent in the event of him occupying any land while it is unfit has already been noticed. A tenant is not deemed to be in occupation merely because—(a) furniture or other goods belonging to or used by him remain on the land; or (b) he visits the land from time to time to remove or take steps to preserve such furniture or goods; or (c) he retains possession of keys.

On the other hand, occupation by his sub-tenant is deemed to be the occupation of the tenant: section 1 (8).

For the purpose of these provisions "rent" includes periodical payments for services, lighting, heat, board, use of furniture, etc. (section 1 (10)).

When the land is made fit again the liability for rent recommences. When a dwelling-house is deemed to be fit under the provisions of sub-section (4), which have been considered above, but the extent of the accommodation has been substantially diminished as the result of the damage, the rent payable for the diminished accommodation is to be reduced to such extent as may be agreed or, in default of agreement, fixed by the Court. There is no provision for re-assessment of the rent in a case where the accommodation is not diminished but is worth less since a measure of repair has been effected which satisfies section 1 (4) but does not amount to complete re-instatement so that the tenant loses some part of the comfort and amenities which he previously enjoyed. The tenant's only legal remedy in such a case is either to give notice to quit or to negotiate for a reduced rent.

The Act makes some attempt, though not a comprehensive one, to deal with the problem of the tenant who simply vanishes, so that no notice to quit or other proceedings can be served on him. By section 1 (6) the landlord of a short tenancy may apply to the county court and on his showing (a) that the land is fit; (b) that a period of not less than three months has elapsed since the land was rendered fit and during the whole of that time the tenant has not been in occupation (note the restricted sense of "occupation" mentioned above) of the land either in whole or in part and has not paid any rent in respect of that period or any

part thereof; and (c) that the landlord has made all reasonable efforts to communicate with the tenant and has failed to do so—the Court may if it thinks fit determine the tenancy. In such case the Court will give to the landlord immediate possession of the tenant's interest in the land, at the same time giving directions as to sub-tenants, if any.

Apparently this procedure does not apply if the tenant has paid any rent at all or been in occupation for a single day since the land was rendered fit. In such case the landlord is left to his ordinary remedies, such as under the Small Tenements Recovery Act, 1838.

It is to be observed that these provisions as to short tenancies do not apply in a case where, before the passing of the new Act (August 7, 1941), a notice of disclaimer has been served or a notice of retention has been or is deemed to have been served, unless the notice is of no effect.

Apportionment of rent in case of war damage to premises comprised in a short tenancy is provided for by section 13 of the Act of 1941. Where rent ceases to be payable in respect of a short tenancy by virtue of section 1 of the Act, the rent payable for the period during which the land becomes unfit is apportionable whether payable in advance or otherwise, and any rent paid by the tenant already in excess of the amount apportionable to the part of the period preceding the date on which the land became unfit is recoverable by him.

Where a building comprised in the tenancy is unfit by reason of war damage, and urgent repairs are necessary to prevent deterioration and are not being executed, the fee simple owner or any lessee or any mortgagee of the fee simple or a lease may, if he cannot obtain permission to enter from the person having control of the building, or cannot obtain such permission without unreasonable delay, enter upon the building for the purpose of executing the necessary repairs, and may use such force as is reasonably necessary for effecting entry (section 14 of the Act of 1941). The tenant of a short tenancy is unlikely to have need to invoke this power, and he is unlikely to have succeeded in mortgaging an interest of such nature. In the case of short tenancies this valuable power is more likely to be exercised by the freeholder or a superior leaseholder or a mortgagee of such, in a case where the tenant retains control of the building still despite the war damage and is neglecting the repairs necessary to prevent deterioration. This section affords a valuable means of forcing entry in such a case for the purpose of preserving the structure by immediate action, whereas considerable damage might occur while more dilatory

measures were pursued under the tenancy agreement. It is to be observed that this power of entry applies to all leases, not merely short tenancies, and a lessee may have occasion to invoke it against a sub-lessee. Another power given by the same section of the Act is power to a tenant of unfit land to enter, notwithstanding service by him of notice of disclaimer, for the purpose of preserving or removing furniture or other goods. This provision does not, however, seem applicable to short tenancies because, unless the tenancy is determined by notice to quit, the tenant remains in possession of his leasehold interest notwithstanding that no rent is for the time being payable by him; accordingly he does not need any special authority to enter for the purpose of preserving or removing furniture or for any other purpose. It is to be noted that visiting the land for the purpose merely of preserving or removing furniture does not constitute re-entry into occupation so as to start the liability for rent running once more: section 1 (8).

A SHORT INDEX TO EMERGENCY REGULATIONS AFFECTING PROPERTY.

(*Continuing the Indexes on pp.* 96 *and* 293 *of Volume* 5.)

AGRICULTURAL HOLDINGS.

Restrictions on Sale.—Where the whole or part of an agricultural holding is subject to a contract of sale made since September 3, 1939, or has been sold in pursuance of such a contract, any notice to quit given to the tenant so as to expire at any time after the end of 1941 shall be null and void unless, before giving the notice or before the end of 1941, whichever is the later, the Minister of Agriculture and Fisheries consents in writing thereto (1941, No. 1774).

ALLOTMENTS.

1941 No. 743 provides a penalty for allowing dogs to stray on allotments.

COMPANIES.

Capital issues. 1941 No. 648 replaces 1940 No. 2187.

1941 No. 649 amends para. 3 (b) of the Defence (Finance) Regulations, 1939.

LAND DRAINAGE.

1941 No. 1154 deals with conditions under which War Agricultural Committees may request drainage boards to prepare schemes for improvement of land.

LOCATION OF INDUSTRY.

The Board of Trade may, by order made as respects any area in the United Kingdom, provide for prohibiting the carrying on at any premises in the area of a trade or business of such class as may be specified in the order which was not carried on there when the order came into operation. (1941 No. 653.)

REQUISITIONED LAND.

Para. 3 (a) of Regulation 50 (see 4 Conv., p. 65) provides that where anything affixed has been severed from requisitioned land no person under obligation by lease or other instrument shall be liable to replace the thing severed or pay damages or penalty in consequence of the severance, and any guarantor of such performance of obligation is relieved of his liability (1941 No. 1153).

RIGHTS OF WAY.

The Minister of Transport may by order provide for the stopping up or diversion of any highway passing through land used, or intended to be used, for the purposes of a railway, and for prohibiting or restricting the exercise of any right of way over such land. (1941 No. 579.)

SECURITIES.

1941 No. 755, amending Regulation 1 of the Defence (Finance) Regulations, tightens up restrictions on transfer, etc., of securities to be acquired by the Treasury.

WAR DAMAGE.

War Damage to Goods (General) Regulations (1941 No. 787) deal *inter alia* with free grants in respect of private chattels, damage to chattels before coming into operation of chattels schemes, payments to persons under age and to non-residents, and avoidance of duplication of payments.

ARMCHAIR NOTES.

It is perhaps depressing to know that Montesquieu was of the opinion, following Tacitus, that the English borrowed the idea of their political government from the Germans. This we are told in that brilliant collection of satirical essays penned by the late Mr. Justice Darling, and entitled *Scintillæ Juris* (*a*). Although those essays were written many years ago, they are, if possible, more topical to-day than they were when Sir Edward Clarke wrote a prefatory note to the 1914 edition. Can one fail to see how apposite to the present international situation is the following passage? : "It is in a manner the misfortune of States that they must constantly exchange treaties and understandings, just as private persons send newspapers and Christmas cards to distant relatives, merely to show that no rupture has yet occurred between them." And the words which follow might almost have been written by Adolf Hitler himself, "It is not often unfair to disregard any obligation which may be insisted on as arising out of such a correspondence, since the bad faith is in fact on the part of those who claim the performance of a promise made in mere courtesy." And are we not reminded of Russia (in some vague way) by the succeeding passage : "Besides this a nation which makes any concession to another, and receives no real equivalent, is always in such a position that by municipal law the grant might be avoided on the ground of duress". Somewhat acid no doubt, but extremely apt! Cynicism is indeed the prevailing note of these essays. The observations upon treaties are particularly cynical, "Mere allies will never co-operate longer than suits their convenience", and "Where three are hostile to one another, there is always ground to expect an alliance of two". These passages are reminiscent of Germany, Russia, and France; and those who care to read page 192 will find a passage which might well have been written concerning Rumania. And if the words already quoted are appropriate to the present "Emergency", what of this?

> "Never since the Locrians, having sworn to keep their compact as long as they stood upon earth and had heads upon their shoulders, put earth in their shoes, and emptied it out again, throwing away the heads of garlic which they had placed on their shoulders—never have treaties been so jocosely broken as now".

(*a*) *Scintillæ Juris and Meditations in the Tea Room*; price 5s. net. Sweet & Maxwell, Ltd.

How true is the essayist's observation that the curious English habit of being unready is "unfair to others" because "later we exact retribution for the injury our own stupidity has brought upon us".

There is no dull page in this book in which the essayist conducts us from International Law to Genesis, the Statute de Donis to lime-juice, and metaphorical cabbages to defunct kings.

He speaks, too, of the Superior Courts whose reported decisions "are, *even by themselves*, viewed with so much respect".

Many true words were written in jest, particularly these:

> "I will here set out the whole of this International Code in its integrity: *La raison du plus fort est toujours la meilleure.*"

To the decided cases which were quoted by Mr. Justice Darling as authorities for this proposition we must add: *Mussolini* v. *Albania* (*King of*), reported *passim*; *Hitler* v. *Sikorski*, and many others, *ibid.*

Space does not permit of the reproduction of more than one selection from Mr. Justice Darling's observations upon maxims. "The maxim which, though rarely quoted, most concerns all who go to law, is '*Caveat viator*'", meaning, presumably, "Watch your step!"

In the chapter "Of Judges" will be found reports of cases which never were, on land or sea. In one of them it is decided after much argument that the male parent of an illegitimate child is not his father-in-law, and that his only legitimate parent is Mother Earth.

Those who read these essays will not, we hope, believe them. But that they are almost unbelievably witty is true. Those who have no copy will do well to purchase one. If they open it when the next warning siren sounds the "All thick" it will not seem long until the strains of the "All clear" float into the house or dug-out (as the case may be).

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Contract for sale — sufficient memorandum — liability of auctioneer for breach of warranty of authority.—In *Fay* v. *Miller, Wilkins & Co.*, 110 L. J. Ch. 124, auctioneers put property up for sale at the instance of the vendor subject to a reserve price. The auctioneers knocked down the property to the plaintiff at a price which was held as a fact to be below the reserve price authorised by the vendor. The note of the contract contained a space for the vendor's name which was not completed, but in the conditions of sale embodied in the memorandum special condition 4 stated : " the vendor will convey as personal representative ". Bennett, J., had refused to grant an order for specific performance on the ground that the vendor was not bound by the contract, which was unauthorised, and declined to give damages on the ground that there was no sufficient memorandum of the contract to support an action at common law for breach of warranty of authority. The Court of Appeal's decision is reported only on the second point, where they held, reversing Bennett, J., that there was a sufficient memorandum. The only deficiency was the absence of name or description of the vendor, but the Court held that the special condition contained a sufficient description.

This decision involved two points. First, whether a description as " personal representative " was a sufficient description of the vendor, and secondly, whether in the form taken in the contract under review the term " personal representative " could be used as a description of the vendor at all. The first point did not present any immediate difficulty in view of the decisions in *Rossiter* v. *Miller*, 3 App. Cas. 1124 (" owner " or " proprietor "), *Hood* v. *Barrington*, L. R. 6 Eq. 218 (" executor " or " trustee ") and *Catling* v. *King*, 5 Ch. D. 660 (" trustees for sale "), where similar descriptions had been sufficient for the purpose, since all that is necessary apparently is something " to lead the inquirer to the actual vendor " : *per* Greene, M.R., at p. 126, who cited *Fry on Specific Performance* (2nd ed., para. 331, p. 148, repeated in all subsequent editions), which " approved a *dictum* of Lord Romilly to the effect that it is sufficient if the vendor is described as mortgagee, executor or trustee ". In effect these decisions

appear to provide an alternative of description by name or by the character of estate ownership. It would be interesting to see it go one stage further, for example, to "liquidator", who is not an estate owner. But, as Lord Greene pointed out, "it is no doubt difficult to state any logical rule to explain the decisions".

The second point, in a way, presented a more difficult problem and one of more general application. It is quite clear, and so it was argued, that the purpose of the special condition was primarily to show the character in which the vendor was conveying, and was mainly intended to provide that the vendor, whoever he was, would not give any covenants for title other than those implied by his being expressed to convey "as personal representative" under the Law of Property Act, 1925. This argument was not effective because, as was pointed out by both Greene, M.R., and Clauson, L.J., the limited statutory covenants are only imported when the grantor both conveys in the capacity of personal representative and is expressed to convey as such. Taking this view of section 76 (1) of the Law of Property Act, 1925, the Court, therefore, came to the conclusion that the clause must operate, if only indirectly, as a description of the vendor, not only at the time of conveyance but also at the time of contract.

So far as we are aware there is no earlier decision pointing out that the grantor must convey as well as be expressed to convey "as beneficial owner", etc., in order to apply section 76. In *Parker* v. *Judkin*, [1931] 1 Ch. 475, personal representatives got the advantages of their status to give an overreaching conveyance despite the fact that they sold as beneficial owners, but this is the opposite side of the picture. It is, of course, quite possible expressly to provide for the statutory covenants, as was pointed out by the Master of the Rolls : see 1 K. & E. (14th ed.), p. 592; and it seems clear from the context that in the learned Judge's opinion, unless there was some such clause, a mortgagee who was expressed to convey as beneficial owner, for example, or conversely, would not come within the scope of the section.

If this view of the decision is correct, it is material to decide whether a grantor *does* convey as beneficial owner, mortgagee, etc. It is to be remembered that the number of capacities is strictly limited, so, for example, a liquidator conveys as trustee and not as liquidator : 1 K. & E. (14th ed.), p. 798. On the other hand, there is no definition of "beneficial owner" in the Act. For instance, can any estate owner selling under the Settled Land Act, 1925, be properly described as conveying as a "beneficial owner"? It is felt that if covenants for title are being enforced this question may arise for determination, and in the meantime it is possible

only to take the precaution in cases of doubt to use the special form for express application of the implied covenants.

A point of less general importance was also dealt with, namely, whether the costs of the abortive proceedings for specific performance could be included in the damages recovered in respect of the breach of warranty of authority. The Court directed a general inquiry into damages, but also directed that in this inquiry the costs incurred by the plaintiff in these proceedings not only of the plaintiff but also of the vendor must be included.

(1 K. & E., pp. 343, 589–90, 592; 3 K. & E., 128, 261.)

Lunatic—bankruptcy—appointment of receiver by Master in Lunacy.—Re a Debtor (No. 1 of 1941), [1941] 3 All E. R. 11, should be noted shortly. On January 28, 1941, the debtor committed an act of bankruptcy; on March 4, 1941, the Master in Lunacy appointed a receiver; and on March 17, 1941, a receiving order was made by the Registrar of the county court in which the petition had been filed. On appeal to a Divisional Court of the Chancery Division it was held that a lunatic not so found by inquisition could be adjudicated bankrupt, but that the trustee in bankruptcy, being in no better position than the debtor, would take subject to the title of the Receiver in Lunacy despite the doctrine of relation back, and the fact that the Receiver in Lunacy had been appointed subsequently to the act of bankruptcy did not prevent the Receiver from having control of the debtor's property.

As a result the title of the trustee in bankruptcy is ineffective against that of the Receiver in Lunacy. On the other hand, of course, the title of the trustee in bankruptcy may include certain property, under the various bankruptcy rules for swelling assets, which were outside the province of the Receiver in Lunacy.

Fraud—contract for sale by purchaser prior to completion.—Gordon Hill Trust v. *Segall*, [1941] 2 All E. R. 379, can be shortly noted because its facts were peculiar. It primarily operates as a warning against actions of deceit. The defendant had a contract to purchase certain property subject to special conditions in the contract. Two of these conditions released the purchaser if there were restrictions which prevented him from carrying out his pur-

poses, and one condition enabled the vendors to rescind if they could not find alternative accommodation within a certain period. After the lapse of this period, but before the vendors had acquired alternative accommodation, the defendant entered into negotiations for a contract through agents to sell the property. The negotiations subsequently broke down after the exact state of affairs was realised by the intending sub-purchasers, who then sued for damages for deceit on the ground that they had been put to expense by a false representation that the defendant was the owner of the property. Wrottesley, J., awarded damages and based his judgment primarily on *Richardson* v. *Silvester*, L. R. 9 Q. B. 34, where damages were awarded against a person advertising premises to let over which he had no control and which were not to let. The Court of Appeal reversed the judgment of Wrottesley, J., partly on the special facts concerning the nature of the representation and partly on the ground that a purchaser, while a contract subsists, is in some sort an owner and that at the time of the negotiations the defendant thought that he could obtain specific performance. The case is not really an authority outside its particular facts, because both the nature of representation and the position of the defendant depended upon the peculiar circumstances. It was distinguishable from *Richardson* v. *Silvester* (*supra*) because there the defendant was serving some other and special purpose of his own and knew that he had no authority to deal with the property.

Emergency legislation — mortgage — appointment of receiver where mortgagor bankrupt.—Re Midland Bank, Ltd.'s Application, [1941] 3 All E. R. 299, goes one stage further than *National and Provincial Bank* v. *Liddiard*, [1941] Ch. 158 (noted *ante*, Vol. 5, p. 217), which laid down that if a person entitled to an equity of redemption is not under a personal obligation to pay the debt he cannot claim the protection of the Courts (Emergency Powers) Acts. In the instant case the mortgagor had been adjudicated bankrupt and the bank was claiming to exercise the power to appoint a receiver. Uthwatt, J., held that the bank was covered by the earlier case noted above that the trustee in bankruptcy was not entitled to any relief under the Act and that the mortgagor was not entitled to be a party to the proceedings. He then gave leave to appoint a receiver limited to the powers vested in receivers under the Law of Property Act, 1925. The learned Judge expressly reserved any right to exercise the inherent power to grant relief against the right to realise the security by possession referred to by

Farwell, J., in *Hinckley and South Leicestershire Building Society* v. *Freeman*, [1941] Ch. 32 (noted *ante*, Vol. 5, p. 140). He therefore gave liberty to apply to exercise any other remedies.

The learned Judge expressed the view that it was unfortunate that the Court had no jurisdiction to grant relief where the person interested in the property was either a trustee in bankruptcy or an assignee of the mortgagor on the ground that they were not persons " liable to the mortgagor in respect of any obligation sought to be enforced ". The importance of this point with regard to assignees from the mortgagor is, perhaps, of particular importance: see also *Re Midland Bank*, [1941] Ch. 350 (noted *ante*, *sub nom. Franklin* v. *Midland Bank*, Vol. 5, p. 300).

Emergency legislation—Execution of Trusts Act, 1939—power of attorney to two attorneys jointly and severally—execution by one attorney.—Re Feversham's Contract, [1941] 3 All E. R. 100, deals with the construction of section 1 (1) of the Execution of Trusts Act, 1939, which enables a trustee, personal representative, tenant for life or statutory owner to give a power of attorney " to any person or to two or more persons jointly " for the exercise of any functions vested in him. The Earl of Feversham, as tenant for life, had executed a power of attorney in favour of two persons " jointly and each of them severally ". A conveyance in pursuance of a contract for sale was executed by one only of the attorneys, and a Vendor and Purchaser summons was issued to ascertain whether this was a satisfactory exercise of the power. Morton, J., held that, despite the wording of section 1 (1), which seemed to provide that the power could be delegated either to one person or to two or more persons jointly, he was entitled by virtue of the Interpretation Act, 1889, to construe words in the singular as words in the plural unless there was a contrary intention, and consequently as there was not, in his opinion, any contrary intention, he could construe the words " any person " as " any persons ", and that therefore several persons could be appointed to act severally. In these circumstances the conveyance was validly executed by one only of the attorneys. The learned Judge pointed out that this construction was the most convenient, since a soldier might be seriously inconvenienced if he could select only one attorney who might die while the soldier was still abroad.

This decision may prove very useful, and should be borne in mind when the provisions of the Act are being utilised.

(3 K. & E. Supplement, p. 6, n. (*l*).)

Contract for sale—sale with vacant possession—land requisitioned but possession not taken prior to date for completion.—Re Winslow Hall Estates and Glass Bottle Manufacturers' Contract, [1941] 3 All E. R. 124, is not as important as it might be because the learned Judge (Bennett, J.) was careful to confine it to its peculiar facts. Property was sold with vacant possession, subject to a Government requisition of a minor part, and completion was to take place on January 25, 1941. On January 24, 1941, the purchaser's solicitors were told verbally that the whole of the property was requisitioned, and on January 25 they received formal notice. The vendors were not on that date ready to complete, but they were ready to do so on January 31, and they wrote to the purchaser's solicitors that the property was still vacant. At some time before proceedings the Government did take possession. Bennett, J., held that the purchasers were not entitled to a declaration that the vendors could not show a good title, but carefully safeguarded himself from deciding what the position would have been if possession had actually been taken before the vendors were ready and willing to complete.

The learned Judge did, however, hold that a requisitioning notice was not an incumbrance. In his view it was not incumbent upon the authorities to issue any requisitioning notice, which was simply a polite intimation that they were proposing to act. He also held, as a matter of construction, that the mention in the contract for sale of the existing requisitioning notice was not an implied contract that the property would be sold subject to no other requisitioning notice, but this last point obviously turns upon the terms of individual contracts.

(1 K. & E., p. 328, nn. (*l*) and (*j*).)

Emergency Legislation—mortgage—leave to realise security.—Re Chalfont and District Building Society, [1941] 3 All E. R. 41, is an interesting case on the circumstances in which leave to realise a security will not be granted. Here the mortgagor proved that he was unable "immediately" to pay the mortgage debt apart from the security, which was his dwelling-house. If he had been prepared to allow the security to be sold it would apparently have met the debt. His inability to pay the mortgage debt, which was repayable by instalments, was due to the decline in his practice consequent upon the war. Morton, J., held that the purpose of the emergency legislation (*inter alia*) was to preserve the debtor's home, and, being satisfied that apart from the security the debtor

could not raise the amount necessary to pay off the mortgage, he refused leave to realise the security but upon terms of monthly payments being made.

The case also refers to the proper practice of a debtor. Here he was entitled to a reversionary interest, and the Court made it plain that the Court should be fully informed of the value of such an interest and its possibilities for the purpose of raising money. The burden is on the debtor to satisfy the Court of his inability " immediately " to satisfy the debt from any source under the debtor's control. It should also be noticed that the leave to realise the security was refused on the ground that it comprised a house which was the debtor's home. The learned Judge did say (at p. 43) : " I do not think that it would be said that, if a man owes £1,200 and has a house—namely, a mortgaged house, which is worth £1,250—he is able to pay the debt within the meaning of the Act. I do not think that that can be the intention of the Legislature. It is true that, in these circumstances, he can sell the house for £1,250 and pay off the whole of the mortgage debt, but, in the very act of doing it, he has lost that which the Act was intended to preserve—namely, his house." It is presumed that if the security had not been the debtor's home it would not have been protected from realisation. How far this principle applies, if at all, to property other than a mortgaged house it remains to be seen. Obviously it might equally apply to a farm or business premises used by the debtor for the purpose of his business.

Emergency Legislation—contract for sale—failure to complete —forfeiture of deposit.—John Barker v. *Littman*, [1941] 2 All E. R. 15 (noted *ante*, vol. 5, p. 302) has been affirmed on appeal, [1941] 3 All E. R. 537. The Court has no power under the Emergency Legislation to consider whether the circumstances warrant a refusal to make an order forfeiting deposit for failure to comply with an order for specific performance.

The decision is of interest for the judgments of Scott, L.J., and Luxmoore, L.J. Scott, L.J., dealt with the common law principle by which the deposit ought to be forfeited whether it was in the hands of the vendor or of a stakeholder. Luxmoore, L.J., dealt with the relevant decisions on the Emergency Legislation. In *Austins of East Ham* v. *Macey* (1941), 57 T. L. R. 446 the Court of Appeal held that there was nothing in the Courts (Emergency Powers) Act, 1939, which required any condition

precedent to be satisfied before an order was made rescinding the contract for failure to complete.

In *S. and A. Services* v. *Dickson*, [1940] 2 K. B. 219, again the Court of Appeal had held that the Courts (Emergency Powers) Act, s. 1 (2) (*a*) related only to remedies by way of self-help and not to cases of judicial remedy.

Consequently the Court was of opinion that there was nothing in the Courts (Emergency Powers) Act, 1939, which affected the common form order forfeiting the deposit, though as Luxmoore, L.J., pointed out (at p. 541) the term "forfeiture of deposit" was really a misnomer since all the Court did was to declare that neither at law nor in equity had the purchaser any right to recover the deposit. Note, however, that this decision does not affect the principle in the Law of Property Act, 1925, s. 49 (2) that where the Court *refuses* specific performance or in any action to recover the deposit the Court has a discretion to order its return.

(1 K. & E., p. 321.)

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2. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration of assets—possible debts abroad—advertisement for claims—distribution under order of the Court.—It is settled law that a personal representative acting under an English grant must apply the assets, which come into his hands, for paying all the debts of the deceased, whether owed to creditors here or abroad, according to the rules (as to priority, etc.) in force in this country. Accordingly, where it is likely that the deceased may have incurred debts abroad, a question arises as to what, if any, advertisements for creditors should be published outside the jurisdiction in order that his personal representative may qualify, under section 27 of the Trustee Act, 1925, for statutory protection against unknown foreign creditors when he distributes the estate. In this connection, it will be remembered that section 27 includes in its requirements "such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a Court of competent jurisdiction in an action for administration". The decision in *Re Gess, Gess* v. *Royal Exchange Assurance*, [1941] W. N. 184, a chamber summons reported by leave of the Judge, involved facts in which, the

customary advertisements having been published in this country, it was not possible to advertise for creditors in the foreign country concerned. The deceased, a Polish national domiciled in England, had died intestate in England in 1939. His liabilities were known to include certain specified debts in Poland; but these were the only foreign liabilities known to his administrators here. In consequence of the German occupation of Poland, it had become impossible to advertise for creditors in that country. On these facts Morton, J., the administrators undertaking to pay to the Custodian of Enemy Property in England the amount of the known Polish debts, authorised the administrators to distribute the estate without further advertisements or inquiries in respect of possible claims abroad, on the footing that all the debts and liabilities of the estate had been ascertained. There appears to be no reported precedent for granting this particular type of relief. Although the distribution of an estate with leave of the Court operates as a protection for the personal representatives, it does not, of course, preclude unsatisfied creditors from following the deceased's assets into the hands of the beneficiaries under his will or intestacy.

(2 K. & E., p. 366, n. (*k*).)

Construction—forfeiture clauses—forfeiture dependent upon a state of mind—uncertainty.—During the past two years the Courts of first instance have been troubled by the question whether a condition subsequent, whose operation depends upon the holding or failure to hold a particular religious faith, is void for uncertainty. *Re Blaiberg*, [1940] Ch. 385 (noted Vol. IV, pp. 442—445) showed both Farwell, J. (unreported), and Morton, J., answering this question in the affirmative. Even in *Re Evans*, [1940] Ch. 629 (noted Vol. IV, pp. 442—445), and in *Re Mylne*, [1941] 1 All E. R. 405 (noted Vol. V, p. 313), where Farwell, J., held certain conditions subsequent to be valid, he reached this decision in the one case by holding that the forfeiture there prescribed (on becoming a "convert" to the Roman Catholic religion) turned on an outward and visible ceremony rather than on a mere state of mind, and in the other case on the ground, *semble*, that the clause then before him was a condition *precedent* and was consequently to be treated differently.

The general question has now been considered by the Court of Appeal in *Re Samuel, Jacobs* v. *Ramsden*, [1941] W. N. 192; [1941] 3 All E. R. 196, with the result that Morton, J.'s, decision in *Re Blaiberg* has been overruled. This judgment of the Court of

Appeal (reversing a decision of Bennett, J., noted Vol. V, p. 312) was delivered by Lord Greene, M.R., and appears to be based upon the following grounds: (1) *Re Blaiberg* was preceded by numerous earlier decisions where, although clauses for forfeiture dependent upon a state of mind were concerned, no question was raised that the clauses were thereby void for uncertainty; (2) a forfeiture clause, though so framed as to be difficult to apply in practice, is not void for uncertainty so long as its meaning is clearly ascertainable. The judgment, as reported, appears to quote no authority for this latter proposition. There is a celebrated *dictum* of Lord Cranworth (*Clavering* v. *Ellison*, 7 H. L. C. 707, 725) to the effect that a condition subsequent must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine, and one of Fry, J., to the effect that a condition subsequent must have both certainty of expression and certainty in its operation (*Re Viscount Exmouth*, 23 Ch. D. 158, 164). It would now seem that such *dicta* as these should be taken to mean only that the words of a forfeiture clause must indicate clearly in what circumstances a forfeiture is intended—not that those circumstances, when they occur, must be readily ascertainable. Moreover, the learned Master of the Rolls indicated that the true method of construing phrases such as " of the Jewish faith " is to avoid subtle theological distinctions and to concentrate primarily upon the *avowed* religious convictions of the beneficiary (or other person) concerned, testing his credibility on the point in the same way as the evidence of a witness is ordinarily tested. The view that a Court is powerless to decide questions as to a man's beliefs is incorrect; and if, in some particular case, it turns out to be impossible to convince the Court that his beliefs fall within the terms of the forfeiture clause, the result is merely that no forfeiture occurs—for the onus lies on the person who alleges that the condition has been broken.

Re Samuel itself concerned a will which contained a forfeiture clause in respect of any child of the testator who should " contract a marriage with a person who is not of Jewish parentage and of the Jewish faith ". Two sources of uncertainty were alleged. First, the words " Jewish parentage " might refer either to race or to religion or to both. In the light of the context, and of the fact that the testator must have been well aware of the notorious difficulty which is likely to attend a racial test, these words were construed to refer merely to the religious aspect of the matter. Moreover, the ordinary meaning to be attributed to the word " parentage " in such a context showed that forfeiture was intended

to occur unless the child's spouse was born of parents *both* of whom were of the Jewish religion, and that, in point of time, this test related to their religion at the time when the spouse was born (*i.e.*, when the parentage arose). The other alleged source of uncertainty was the phrase "of the Jewish faith", in that it referred to a state of mind—an objection which applied equally to the words "Jewish parentage" when construed in the religious sense indicated above. As already mentioned, this objection was held to be unfounded. This part of the judgment of the Court, besides expressly overruling the decision of Morton, J., in *Re Blaiberg*, throws doubt upon the unreported decision of Farwell, J., in that case, and upon *Re Evans*, *supra*, and even, perhaps, *Re Tegg*, [1936] 2 All E. R. 878, where a requirement that beneficiaries should "conform to" the Established Church of England was held void for uncertainty. The Court, however, decided to leave open the authority of these cases, since the material words of the forfeiture clause with which it was concerned were not precisely the same as those which were considered in *Re Evans* and *Re Tegg*.

It seems unlikely that the above decision of the Court of Appeal will be reversed or overruled. Testators, therefore, are again free to attempt to rule the mental as well as the physical conduct of their children from the grave. Nevertheless, the fact remains that a forfeiture depending on a state of mind, though not void in law, is necessarily difficult to establish in practice. Accordingly, when drafting a clause for forfeiture intended to operate if a donee assumes a certain state of mind, there is still much to be said in favour of so framing the clause that the forfeiture turns upon the happening of some external event or events indicative of the state of mind concerned.

(2 K. & E., p. 858, n. (*cc*).)

Trusts—applications to the Court for additional powers—power to blend the funds of identical trusts—Trustee Act, 1925, s. 57.—Section 57 of the Trustee Act, 1925, conferred upon the Court a new power, independent of salvage principles, to authorise trustees to deal with the trust property in a manner not authorised by the trust instrument. "Where in the management or administration of any property vested in trustees, any . . . disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose

vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees . . . the necessary power for the purpose . . ." *Re Craven's Estate* (*No. 2*), [1937] Ch. 431, decided that the test of expediency to be applied in such cases is whether the proposed transaction is, in the opinion of the Court, expedient for the trust as a whole: it is not sufficient that the proposed transaction is desirable from the point of view of one only of a number of beneficiaries thereby affected. Accordingly, the Court there refused to use section 57 for extending, for the sole benefit of one of several beneficiaries, the scope of a limited power of advancement contained in a testamentary trust.

The recent decision in *Re Harvey, Westminster Bank, Ltd.* v. *Askwith*, [1941] 3 All E. R. 284, concerned the respective residuary estates of two sisters, who died in 1931 and 1936 respectively. In each case, the testatrix had directed that her residuary estate be held for the foundation of a home to be called the "Thirtle Harvey Memorial Home". These residuary gifts were in identical terms. The bank, as sole remaining trustee of both wills, applied by summons for a decision whether the two residuary funds might be blended into one fund for the foundation of a single home, with the name and for the purposes prescribed (in identical terms) by each of the two wills. In a briefly reported judgment, Bennett, J., held that although, on their true construction, neither of the two wills empowered the trustee to blend the estates, this was a proper case for using the power conferred upon the Court by section 57 of the Trustee Act, 1925. He accordingly authorised the trustee to blend the funds for the purpose of forming and maintaining one joint home of the name and character indicated by each of the two wills.

Although the above decisions concern trusts created by will, both they and section 57 of the Act of 1925 are, of course, of general application in the law of trusts.

(2 K. & E., p. 578, n. (*s*).)

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Landlord's liability in respect of lift retained in his possession and control.—In *Haseldine* v. *Daw* (1941), 58 T. L. R. 1, the Court of Appeal has varied the decision of Hilbery, J., reported in 57 T. L. R. 431, *The Conveyancer*, Vol. 5, p. 304. It may be

remembered that in this case the plaintiff was ascending in the lift, which was retained in the possession and control of the landlord, for the purpose of visiting one of the tenants of a block of flats, when the mechanism failed and the lift fell to the bottom. The landlord had entered into a contract with a reputable firm of repairers for the maintenance of the lift by monthly visits. The landlord had consulted the repairers about the slow rate of descent of the lift, and had arranged with them that they should counteract the effect of the wear by certain extra attention. He did not know that the safety of the lift was affected.

We are not directly concerned here with the liability of the repairers, who were held by the Court of Appeal to owe the same duty of care to a person who in the ordinary course might be expected to use the lift as would be owed by a manufacturer under the rule laid down in *Donoghue* v. *Stevenson*, [1932] A. C. 562.

But the liability (if any) of the landlord stands upon quite a different footing. Hilbery, J., had ruled, following *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74, that the visitor was merely a licensee of the landlord, and that from this point of view the landlord's duty to him was merely not knowingly to expose him to a concealed danger or trap. In this case the landlord clearly had not done that. But Hilbery, J., had gone on to consider the landlord's liability from the point of view that he had gratuitously provided a vehicle for the vertical conveyance of the visitor, and that his duty in respect of this vehicle was, on the authority of the cases on carriage of passengers, to exercise due and reasonable care. In the view of Hilbery, J., this duty included care in seeing that the lift was safe for passengers; and the learned Judge held that the landlord had failed in this duty by not inquiring into the safety of the lift when circumstances were brought to his notice which should have caused him to make such inquiry.

The Court of Appeal have not disturbed the first part of this judgment, although Scott, L.J., in an interesting discussion which is entirely *obiter* advances the view that such a visitor is an invitee of the landlord. His view is that the landlord has an interest in facilitating access to the flats by visitors, who therefore come on the implied invitation of the landlord. This theory is, however, open to certain objections, in particular that the landlord, having let the flat to the tenant with a means of access for himself and his visitors, is no longer interested in the business, if any, of persons who use that means of access for the purpose of visiting the tenant. And Goddard, L.J., expressly takes the view that *Fairman's Case* is an authority compelling him to hold that such a visitor is merely a licensee. Clauson, L.J., expressed no view on this, as the plaintiff

failed either way on this issue of the case. Accordingly *Haseldine* v. *Daw* does not seriously challenge the commonly accepted view of the rule established by *Fairman's Case*.

In respect, however, of the landlord's duty with regard to the lift, considered as a vehicle for the gratuitous conveyance of a passenger, the Court of Appeal has reversed the decision of Hilbery, J. Goddard, L.J., takes the view that the passenger carried gratuitously must take the vehicle as he finds it and is only entitled to warning of a danger of which the owner was aware. But even on the basis of Hilbery, J.'s, view of the owner's duty to his passenger, both Goddard and Scott, L.JJ., found on the facts that the owner, by employing a first-class firm of lift engineers to make periodical inspections of the lift, to adjust it and furnish reports on it, and not having received any warning of danger from them, had done all that a reasonable man could do towards seeing that the lift was safe. This is a most important decision from the point of view of owners of blocks of flats, and relieves them of a considerable responsibility provided they place the contract for lift maintenance in responsible hands. At the same time, the reported judgments of the Court of Appeal do not contain any examination of the cases cited by Hilbery, J., on the extent of the liability to passengers carried gratuitously, and it is felt that there is room yet for greater clarification of this subject.

References to *Haseldine* v. *Daw* in the article on "Liabilities of Landlord and Tenant in respect of Disrepair, Nuisance and Dangerous Premises," Part III (*The Conveyancer*, Vol. 5, p. 261), should be qualified accordingly.

As to common staircases, see *Woodfall*, 24th ed., pp. 636, 813.

Landlord and Tenant (*War Damage*) *Act*, 1939—*Validity of informal notice of disclaimer.*—In *Black* v. *Mileham*, [1941] 3 All E. R. 269; 58 T. L. R. 13, the Court of Appeal has decided that if a notice of disclaimer is in writing, in accordance with section 20 of the Act, no other formality is required provided that the document, in some words or other, gives notice to the landlord that the tenant disclaims.

The disclaimer in this case was by a letter which said, "Herewith the balance of the keys for the above. . . . As the flat has been uninhabitable since the 24th ult., I have not been in occupation—there still remains, however, property belonging to H.M. Post Office and the Gas Light and Coke Company on the premises." MacKinnon, L.J., in a judgment concurred in by

Clauson and Luxmoore, L.JJ., said: "The only matter required by the Act is that, under section 20, the notice must be in writing. No other formality or scheme of words is required." This letter was accordingly held to be an effective notice of disclaimer.

It may, however, be pointed out that the brief judgment as reported omits to mention section 7 of the Act, whereby certain information as to sub-tenancies and mortgages of the term must be included in the notice of disclaimer. It had been thought by the writer that inferentially if there were no sub-tenancies or mortgages of the term the notice should say so. However, the Court of Appeal has by implication decided that it is unnecessary to mention the fact at all if no such interests have in fact been created. The drafting of a notice of disclaimer in a simple case has accordingly been made an extremely facile matter which the tenant may achieve almost casually in a letter to his landlord. Even a ground lease for a long term may, since the Amendment Act of 1941, be disclaimed in this easy way. Where, however, there is any sub-lease or mortgage of the term the notice of disclaimer must include the particulars required by section 7 of the Act. This seems to protect the mortgagee in some measure against a casual and ill-considered disclaimer on the part of the lessee, since compliance with section 7 calls for something in the way of a more formal document. This is assuming, however, that the meaning of the Act is that a notice of disclaimer which does not comply with section 7 is of no effect. This, however, is not so certain, since section 7 (4) provides that if any person fails to comply with the provisions of section 7 he shall be liable to make good to any other person any damage suffered by that other person by reason of the failure. Does this mean that the notice is effective but the mortgagee who is not mentioned in it nor served with a notice thereof under section 7 (2) and who accordingly fails to exercise his power of applying to the Court for a vesting order under section 9 is left merely with a personal right to sue the disclaiming tenant for damages? It is thought that this was hardly intended when the Act was drawn, yet in view of the decision in *Black* v. *Mileham* this may be the effect of the Act. Possibly, however, the Court will say that a notice of disclaimer not containing the particulars required by section 7 is ineffective. This would be some protection of the mortgagee against a hasty and ill-considered disclaimer.

Where an effective notice of disclaimer is served by a mortgagor lessee, the mortgagee's only method of retaining his security and qualifying for a value payment under the War Damage Act, 1941, appears to be by application to the Court under section 9 of the

1939 Act for the disclaimed lease to be vested in himself. This course may not be welcome to the mortgagee, but there seems to be no alternative under the Act other than that of seeing his security vanish altogether, since the effect under section 8 of a disclaimer becoming effective is that the disclaimed lease is deemed to have been surrendered and all interests therein (other than an occupation sub-tenancy) are extinguished.

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4. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the subjects with which *The Conveyancer* is primarily concerned.]

Surtax—transfer of income to person abroad—power to enjoy—Finance Act, 1936, *s.* 18.—Section 18 of the Finance Act, 1936, contains provisions for preventing avoidance of income tax by transactions resulting in the transfer of income to persons abroad. If, by means of any such transfer (either alone or in conjunction with " associated operations "), an individual ordinarily resident in the United Kingdom has acquired rights giving him power to enjoy any income of a person abroad, then that income is to be deemed to be his. This is, in substance, the effect of section 18. But the expression " power to enjoy " has in itself no definite meaning, and what is to be deemed to be included in it is explained in sub-section (3). The application of that sub-section is illustrated by the decision in *Lord Howard de Walden* v. *C. I. R.*, [1941] T. R. 177. The facts there were that H., an individual ordinarily resident in the United Kingdom, had entered into a series of transactions resulting in income-producing assets passing from him to certain companies incorporated in Canada in exchange for promissory notes redeemable at intervals over a period of years. The notes were duly redeemed at the appropriate times, and the Case Stated included a finding to the effect that the payments were made by the companies out of income. H. was held to have " power to enjoy " under two different heads. In the first place, sub-section (3) of section 18 provides, in paragraph (c), that there is to be deemed to be " power to enjoy " income where " the individual receives or is entitled to receive . . . any benefit provided or to be provided

out of that income . . . ". In sub-section (5) " benefit " is defined as including a payment of any kind. H. had, therefore, received a " benefit " provided out of the Canadian companies' income. But, even apart from this, there was held to be " power to enjoy " under paragraph (b) of sub-section (3), which extends " power to enjoy " to cases in which " the receipt or the accrual of the income operates to increase the value to the individual of any assets held by him . . . ". It was contended by the Crown, and held to be correctly contended, that, irrespective of the actual receipt by H. of payments made to him by the Canadian companies out of income, there was in any case " power to enjoy ", since the receipt of income by the Canadian companies must operate to increase in some degree, be it large or small, the value of the promissory notes held by H. and awaiting redemption. One further point arose. A part of H.'s claims upon the Canadian companies had been alienated by him in favour of his son. That being so, he contended that, even if he had " power to enjoy " income of the Canadian companies, he could not be treated as having " power to enjoy " the whole of their income. This contention was rejected by Macnaghten, J., who held that, once " power to enjoy " was established (as in this case it was) by reference to the definition in sub-section (3), the whole of the income arising to the person abroad as a result of the transfer fell to be treated as income of the transferor, and that it made no difference that he had given part of his interest away.

Surtax—transfer of income to person abroad—power to enjoy—Finance Act, 1936, *s.* 18.—Reference is made in the immediately preceding note to the definition of " power to enjoy " in section 18 (3) of the Finance Act, 1936, as illustrated by *Lord Howard de Walden* v. *C. I. R.*, [1941] T. R. 177. Another illustration is provided by *Lee* v. *C. I. R.*, [1941] T. R. 181, where investments had been transferred to a Canadian company by L., an individual ordinarily resident in the United Kingdom, in exchange for shares in the company, plus certain promissory notes. The company's share capital was divided into two classes of shares. The " A " shares (nearly the whole of which had been issued to L. and his wife) entitled the holders to a fixed non-cumulative dividend of 50 cents per share, while the holders of the " B " shares (all of which, so far as issued, were held by children of L.) were entitled, after the " A " dividend had been paid, to " any surplus available for dividends as and when declared by the Directors of the Com-

pany". In a winding-up, the "A" shareholders were entitled to a return of capital and the "B" shareholders to the balance (if any) of the surplus assets. The right to attend and vote at meetings of the shareholders and to requisition special general meetings was enjoyed by the "A" shareholders only, to the exclusion of the "B" shareholders, and any director could be removed by resolution carried at a special general meeting. Dividends were payable on being declared by the directors. L. was not a director, but since he and his wife held virtually all the "A" shares, and were, therefore, in a position to control the directors, it was held that L. had "power to enjoy" the income of the company by virtue of paragraph (e) of section 18 (3), which extends "power to enjoy" to cases in which "the individual is able in any manner whatsoever and whether directly or indirectly to control the application of the income". This was the main ground on which Macnaghten, J., based his decision in favour of the Crown, though he added that, even apart from paragraph (e), L.'s right to a dividend on the "A" shares brought him within paragraph (c), which attributes "power to enjoy" income to a transferor who "receives or is entitled to receive . . . any benefit provided or to be provided out of that income", "benefit" being defined in sub-section (5) to include "a payment of any kind".

Surtax—transfer of income to person abroad—income consisting of profits of trade—Finance Act, 1936, *s.* 18.—In order that section 18 of the Finance Act, 1936, shall apply, an essential prerequisite is a transfer of assets by an individual resident in the United Kingdom by virtue or in consequence of which (either alone or with "associated operations") "income becomes payable" to a person abroad. Do the words "income becomes payable" extend to the profits of a trade? This was the question which arose in *Latilla* v. *C. I. R.*, [1941] 2 A. E. R. 269, where it was answered by Lawrence, J., in the affirmative. L., having a part interest in a South African mine, had transferred it to a company incorporated in Rhodesia. The learned Judge declined to interfere with the Special Commissioners' decision that the circumstances of a transfer were not such as to take the case out of section 18 on the ground that it had not been effected for the purpose of avoiding taxation (see sub-section (1B) of section 18, as inserted by section 28 (3) (d) of the Finance Act, 1938). In contesting a section 18 assessment, the only contention left open to L. was that all that happened as a result of the transfer was that the

company became entitled to the profits arising from carrying on the trade of mining, and that this did not satisfy the words "income becomes payable", which were—it was argued—inapt in relation to trading profits. The learned Judge was not impressed by this point, and, having regard to what was, in his view, the plain intention of the section, held that, if there was a transfer of income-producing assets and the case was in other respects within the scope of section 18, that section was none the less applicable because the income in question took the form of the profits of a trade.

Surtax—undistributed income of privately controlled company —direction and apportionment—Finance Act, 1922, *s.* 21—*Finance Act*, 1937, *s.* 14.—A privately controlled investment company had three classes of shares, but by the Articles of Association the whole of such dividends as might from time to time be declared were payable to the holders of the "B" Ordinary shares. The whole of the "B" Ordinary shares were held by trustees on discretionary trusts. A direction was made, under the companies' surtax legislation, in respect of the company's actual income for the year of assessment 1937–38, a direction by reference to years of assessment (as distinct from accounting periods) being authorised, in the case of investment companies, by section 14 (2) of the Finance Act, 1937. Such a direction may be made if it appears to the Special Commissioners that the company has not, within the year of assessment, "distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for that year". It was on the words "in such manner . . . for the purposes of surtax" (which follow the language of section 21 (1) of the Finance Act, 1922) that the company based its appeal against the direction in *Penang & General Investment Trust* v. *C. I. R.*, [1941] T. R. 153. The line of argument was as follows: Under the company's Articles of Association the only distribution of dividends which could be made was a distribution to the holders of the "B" Ordinary shares. The whole of these shares were held by trustees on discretionary trusts. There being no question of trust income being included by trustees in any return of total income, it followed that it was impossible for the company to distribute any part of its income so as to satisfy the words "in

such manner", etc. Where such a distribution was an impossibility, section 14 (2) of the 1937 Act—and the same would apply to section 21 (1) of the 1922 Act—could not (it was argued) be invoked, and there was no room for a direction. In rejecting this contention, Macnaghten, J., observed that the companies to which the companies' surtax legislation applies include, as provided in sub-section (6) of section 21 of the 1922 Act, "any company which is under the control of more than five persons and which is not a subsidiary company or a company in which the public are substantially interested". The words "in such manner", etc., in sub-section (1) of section 21 (or the corresponding words in section 14 (2) of the 1937 Act) could not—he said—be construed so as to restrict the generality of the language used in sub-section (6) of section 21. Reference was also made in the judgment to the definition of the word "member" in sub-section (7) of section 21. For the purposes of the companies' surtax legislation, a member of a company includes "any person having a share or interest in the capital or profits or income of a company", from which the learned Judge inferred that, for this purpose, the "members" include the beneficiaries under a settlement of the company's shares. It should be added that, had the direction related to a later year of assessment than 1937–38, there would have been no room for any such contention as was advanced in the case under notice, since the effect of section 14 (1) of the Finance Act, 1939 (which applies to the year of assessment 1938–39 and subsequent years—see section 14 (9)) is that where the company is an investment company, its investment income, however much or however little may have been distributed, will automatically be treated, for surtax purposes, as the income of the members of the company and apportioned among them accordingly.

Surtax—privately controlled company—direction and apportionment—Finance Act, 1922, *s.* 21 *and First Schedule.*—In *Roomwood Investments* v. *C. I. R.*, [1941] T. R. 157, a direction had been made in respect of the actual income of a privately controlled investment company for the year of assessment 1937–38, and an apportionment among the members had followed. There was no appeal against the direction, and the question at issue related to the apportionment. Certain shares in the company were held by trustees, and the apportionment was such as to attribute to the trustees the bulk of the income which was the subject of the

direction. The company contended that, for the purposes of an apportionment, trustees must be disregarded and beneficial interests only taken into account. The relevant provisions are those of paragraph 8 of the First Schedule to the Finance Act, 1922, which requires the apportionment to be made "in accordance with the respective interests of the members". It was pointed out by Macnaghten, J., that the words are "the respective interests", and not "the respective beneficial interests". The trustees were none the less members of the company because they had no beneficial interest, and accordingly it was held that, in the absence of any indication in the Act that interests other than beneficial interests were to be disregarded, there was nothing to prevent an apportionment to trustees. The learned Judge added that he was fortified in his conclusion by section 41 (4) of the Finance Act, 1938, which clearly contemplates the possibility of an apportionment to the trustees of a settlement.

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5. *DEATH DUTY CASES.*

By Leonard Stein, Barrister-at-Law.

Estate duty—bona fide purchase for full consideration—Finance Act, 1894, *s.* 3.—Section 3 of the Finance Act, 1894, provides that "estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes . . . where such purchase was made . . . for full consideration in money or money's worth paid to the vendor . . . for his own use or benefit". The question raised in *Att.-Gen.* v. *Kitchin*, [1941] T. R. 133, was whether these provisions applied to the rather peculiar facts of that case, which were, in substance, as follows: In 1921 X made a voluntary settlement of certain shares on trusts for the benefit of various members of his family. X did not reserve to himself any power of revocation or variation. At the time of the settlement the settled shares were the subject of a pooling agreement between X and Y, and in making the settlement X had overlooked the fact that, Y having died, he, X, was, by virtue of the pooling agreement, liable for the payment of a large sum to Y's estate. Not having realised, when he executed the settlement, that it was irrevocable, X was under the erroneous impression that it was open to him to vary it and claimed the right to do so. He was advised by counsel that it was possible

—though it could be put no higher—that he might succeed in getting the document set aside on the ground that it was executed under a mistake as to fundamental facts. What happened in the end was that, after negotiations between X and the beneficiaries of the settlement, the parties entered, in 1922, into what they described as a deed of family arrangement, whereby X received a life interest in the trust property and the right to raise out of the property the amount required to discharge his obligations to Y's estate, and covenanted, on the other hand, to pay a substantial annuity to each of the beneficiaries of the 1921 settlement, the reversion after X's life interest remaining in the beneficiaries in the proportions in which they were entitled, under the 1921 settlement, to a reversionary interest in the capital of the trust fund. Though the document was called a deed of family arrangement, stamp duty was claimed and paid upon it as on a conveyance on sale. On these facts, the question which arose at the death of X was whether exoneration from estate duty in respect of the property the subject of the deed could be claimed under section 3 of the Finance Act, 1894, on the ground that there had been a *bona fide* purchase for full consideration in money or money's worth from the person under whose disposition the property passed. The Court of Appeal, affirming the judgment of Lawrence, J., decided that section 3 applied. In the first place, under whose disposition did the property pass at the death of X? Clearly, it was held, under the disposition of the beneficiaries of the 1921 settlement, for it was they who, out of what had been given to them by the 1921 deed, created the life interest on the termination of which the property passed. Next, was there a purchase from those persons, was it a *bona fide* purchase, and was it by reason only of that purchase that the property passed? All these questions were answered by the Court in the affirmative. The *bona fides* of the transaction was not questioned, and it was only by reason of the 1922 deed that the property passed on the death of X. As to whether there was a purchase, the real nature of the transaction, however described, was that the beneficiaries of the 1921 settlement agreed to X having certain rights in respect of the settled property in consideration of his agreeing to pay them certain annuities and also—if not expressly—at all events by necessary implication—to renounce any right he might conceive himself to possess to get the 1921 settlement set aside. This, it was held, was essentially a business bargain in the nature of a sale, as it had, indeed, been considered to be for the purposes of stamp duty. There remained the question whether there could be said to have been full consideration within the meaning of section 3

of the 1894 Act. X took about £60,000 out of the trust fund and received a life interest in the remainder. His covenant to pay annuities to the beneficiaries was estimated to be worth about £120,000, to which something had to be added for the value, whatever it might be taken to be, of his renunciation of his rights, or supposed rights, in the matter of the setting aside of the 1921 settlement. The beneficiaries, at all events, were satisfied that they were getting value for what they were conceding; the transaction was a *bona fide* and not unreasonable bargain; and, in the view of the Court, it was impossible to say that full consideration did not pass.

THE LIBRARY.

The Conveyancer's Year Book, 1941 (Vol. 2). By SIR LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. London: The Solicitors' Law Stationery Society, Bream's Buildings, E.C.4. xxxvi and 260 pp. (15*s.*)

THIS is the second year of the appearance of the *Conveyancer's Year Book*, so that its appearance and contents will be familiar to some. It is in fact a digest conveniently arranged under alphabetical headings of the cases and statutes for the year 1940: it is perhaps unfortunate that it has to bear the date of the year after that to which it really relates. One of its most valuable features is the direction given to note some of the cases, etc., in standard text-books with references to the pages of these books. Besides arranging the matter in alphabetical order there is also an index which should prevent any difficulty in ascertaining changes made in any branch of law. In these days of rapid change it is certainly an advantage to have ready reference to new law and fresh cases. The notes are clearly written and informative. It is not of course possible in a work of this size to be full or discursive, but the point is succinctly stated and at least the practitioner is put on inquiry. It is, however, doubtful whether careful readers of *The Conveyancer* will find much that is new to them, since the notes of cases in this periodical tend to be fuller and most of the other material is found either in articles or other direct reference to the new legislation and rules and orders. Some readers may, however, find it of use as a handy volume to which reference can quickly be made.

Loose Leaf War Legislation. Edited by JOHN BURKE. Hamish Hamilton (Law Books), Ltd. (5*s.* per part.)

THE 1940–41 volume of this useful series has been completed, and we have received seven parts of the 1941–42 volume. Among the contents of those parts are the Liabilities (War-Time Adjustment) Act and Rules, War Damage to Goods (General) Regulations dealing with damage to chattels before the coming into operation of the private and business chattels schemes, the Courts (Emergency Powers) (No. 1) Rules, and the County Court (Emergency Powers) (No. 1) Rules, the Essential Work (Building and Civil Engineering) Order and the War Damage Contribution Regulations.

A Concise Summary and Guide to the War Damage Act, 1941, for the Use of the Legal Profession. By Sir LANCELOT H. ELPHINSTONE. Solicitors' Law Stationery Society, Ltd. (5*s.* net.)

THE author has tried to state the effect of the Act in a concise form and in intelligible language. All regulations, rules and orders down to No. 345 of 1941 are embodied.